

Planting the Seeds for Public Health

How the Farm Bill Can Help Farmers
to Produce and Distribute Healthy Foods



A Publication of Farmers' Legal Action Group, Inc.

Planting the Seeds for Public Health: How the Farm Bill Can Help Farmers to Produce and Distribute Healthy Foods

February 2010

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Farmers' Legal Action Group (FLAG) is proud to be publishing *Planting the Seeds for Public Health: How the Farm Bill Can Help Farmers to Produce and Distribute Healthy Foods*. It combines legal analysis of the 2008 Farm Bill with recommendations aimed at removing obstacles that impede the efforts of farmers to grow and market healthy food such as fruits and vegetables, thus strengthening the local and regional food systems that support both farmers and access to healthy foods for all.

As always with FLAG publications, this report represents a true collaborative effort. This report was written by FLAG attorneys Jill Krueger, Karen Krub, and Lynn Hayes. Law students Lindsay Smith, Emily Johnson, and Ben Johnson provided helpful research assistance. Rita Gorman Capes copyedited and formatted the manuscript. Debby Juarez designed the cover and provided publishing support. Scott Marlow of the Rural Advancement Foundation International–USA in North Carolina provided wise counsel throughout. We offer our thanks to each of them.

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Susan E. Stokes
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Chapter 1

Executive Summary

I. INTRODUCTION

Childhood obesity is a critical threat to public health.¹ In 2005, the federally appointed Committee on Prevention of Obesity in Children and Youth reported that approximately nine million children over six years of age were considered obese.² Nearly one in three U.S. children is overweight or obese.³ Children who are members of minority and low-income groups tend to be disproportionately affected.⁴

Because obese children currently do not consume enough healthy foods such as fruits and vegetables, success in the battle to end childhood obesity will depend, in part, on the degree of success farmers experience producing these healthy food crops, and marketing them in a manner that ensures they reach all children, including those who are most vulnerable.⁵ In this endeavor, it will be critical to achieve a balance between providing an affordable and accessible supply of fruits and vegetables and a fair return on investment to the farmers who grow them. Strategic marketing through rebuilding local and regional food systems—including direct marketing by farmers to consumers, including nutrition program recipients, and to schools—will help increase children’s consumption of fruits and vegetables and ensure that farmers receive a fair price for their production.

¹ U.S. Department of Health and Human Services, “The Surgeon General’s Vision for a Healthy and Fit Nation,” (2010), available at <http://www.surgeongeneral.gov>. See also “F as in Fat: How Obesity Policies Are Failing in America,” Trust for America’s Health and Robert Wood Johnson Foundation (2009), available at <http://healthyamericans.org/reports/obesity2009>.

² Committee on Prevention of Obesity in Children and Youth, *PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE*, Koplan, et al., eds. (National Academies Press 2005).

³ Ogden, et al., “Prevalence of High Body Mass Index in U.S. Children and Adolescents, 2007-2008,” *Journal of the American Medical Association* (Jan. 20, 2010), 303(3):242-9.

⁴ Wang and Beydoun, “The Obesity Epidemic in the United States—Gender, Age, Socioeconomic, Racial/Ethnic, and Geographic Characteristics: A Systematic Review and Meta-Regression Analysis,” *Epidemiologic Reviews* 29:6-28 (2007).

⁵ “Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences: Report to Congress,” USDA Economic Research Service (June 2009), available at <http://www.ers.usda.gov/publications/ap/ap036/>.

Farmers' decisions regarding which crops to produce and how to market them are greatly affected by federal agriculture and nutrition program policies, including those incorporated into the lengthy Farm Bills that are debated by Congress approximately every five years. The 2008 Farm Bill is the primary source of current federal law governing agriculture and nutrition programs.⁶ The Farm Bill budget is nearly \$300 billion for the years 2008 through 2012.⁷ Despite this expenditure on agriculture and nutrition programs, researchers have just begun to study the capacity of specific regions and the United States as a whole to produce and distribute enough fruits and vegetables to meet the need if every person were to eat the recommended servings under national dietary guidelines.⁸ Meeting the need will likely require that American farmers expand production and strategic domestic marketing of these healthy food crops.

This report strives to explain the key agriculture and nutrition programs included in the 2008 Farm Bill and makes recommendations for policy change in these programs to encourage farmers' production and to facilitate their strategic marketing of fruits and vegetables to make them more accessible to children. The principal questions that guide the discussion are: (1) "What are the ways in which Farm Bill programs currently discourage farmers from producing and strategically marketing fruits and vegetables?" and (2) "What policy changes could be made that would encourage farmers to do so?" For if farmers are to successfully play their important role in ensuring that our nation's children have ready access to healthy food, we must have federal agriculture and nutrition program policies that encourage rather than discourage such actions.

There is strong evidence that limited access to and consumption of fruits and vegetables contributes to childhood obesity. For this reason and because fruit and vegetable growers, particularly those producing on a smaller scale, face significant

⁶ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (June 18, 2008).

⁷ Johnson, et al., "The 2008 Farm Bill: Major Provisions and Legislative Action," at CRS-16, Congressional Research Service Report for Congress (Oct. 3, 2008), available at <http://ncseonline.org/NLE/CRSreports/08Jun/RL33934.pdf>.

⁸ As of this writing, the applicable national dietary guidelines are U.S. Department of Health and Human Services, U.S. Department of Agriculture, "Dietary Guidelines for Americans, 2005," 6th ed. (U.S. Government Printing Office 2005), available at <http://www.health.gov/dietaryguidelines>. See also, Meter, "Finding Food in Farm Country," (Crossroads Resource Center, 2001), available at www.crcworks.org; "Local Foodshed Mapping Tool for New York State," available at www.cals.cornell.edu/cals/css/extension/foodshed-mapping.cfm; Gussow, "Reflections on Nutritional Health and the Environment: The Journey to Sustainability," *Journal of Hunger & Environmental Nutrition*, 1:1, 3-26 (2006).

challenges under current federal agriculture policies, this report focuses on the production and strategic marketing of these important food crops. This focus is not intended to suggest that fruits and vegetables are the only healthy foods, just as the focus on policies that would make fruits and vegetables produced on small- to medium-sized farms more broadly accessible to feed children is not intended to suggest that there are no public health issues related to fruit and vegetable production on an industrial scale. Reports focusing on federal policy implications of these other aspects of our food system would also contribute to the discussion of healthy food systems in this country.

The goal of this report is to provide information to both the farm and public health communities that will further the understanding of existing federal agriculture and nutrition programs and recommended policy changes. As these diverse constituencies seek to form alliances to address shared goals, it is critical to develop shared language and understanding of these policies.

There are many opportunities for the farm and public health communities to work together.⁹ The 2008 Farm Bill programs are being launched now; some are already being modified based on early experience with implementation. Many of the program policy changes recommended in this report could be made by USDA without the need for additional direction from Congress in the next Farm Bill. However, to the extent that such policy amendments do not occur, Farm Bill action may be required. Now is the time to build consensus for policy change to improve existing programs as they are implemented and prepare for the next Farm Bill.

II. DEFINITION OF KEY TERMS

This report focuses on policies that will promote farmers' production and strategic marketing of fruits and vegetables. A couple of terms will be important to understand from the outset of this discussion.

“Specialty crops” is an umbrella term that includes fruits and vegetables. For some USDA programs, federal law defines “specialty crops” to include fruits and vegetables, tree nuts, dried fruits, and horticulture and nursery crops (including flowers).¹⁰ That fruits and vegetables are included in the term “specialty crops” can

⁹ Story, et al., “Food Systems and Public Health: Linkages to Achieve Healthier Diets and Healthier Communities,” *Journal of Hunger & Environmental Nutrition*, 4:3, 219-224 (2009); Jackson, et al., “Agriculture Policy Is Health Policy,” *Journal of Hunger & Environmental Nutrition*, 4:3, 393-408 (2009). See also, Prevention Institute, “Cultivating Common Ground: Linking Health and Sustainable Agriculture, (2004),” available at www.preventioninstitute.org.

¹⁰ Specialty Crops Competitiveness Act of 2004, Pub. L. No. 108-465, 118 Stat. 3882 (Dec. 21, 2004) (codified at 7 U.S.C. 1621 notes § 3). This definition is incorporated into

be explained, at least in part, by understanding that the number of acres devoted to production of fruits and vegetables in the United States is about 2.5 percent of the total cropland under production. According to the 2007 Census of Agriculture, of the nearly 310 million acres of harvested cropland in the U.S. in 2007,¹¹ only about 7.7 million acres were planted to fruits and vegetables.¹²

“Direct marketing” is used to refer to transactions through which an individual farmer, or an organization representing a group of farmers, sells crops directly to individual consumers or to firms representing groups of consumers, in a manner that is intended to lower the cost and increase the quality of food to such consumers while providing increased financial return to the farmers.¹³ The understanding of direct marketing has expanded to include not only sales from farmers to consumers, but also from farmers directly to restaurants, grocery stores, food cooperatives, and institutions such as hospitals and schools.¹⁴ In general, direct marketing involves sale of a crop directly to consumers without the intervention of an intermediary such as a wholesaler, retailer, packer, processor, shipper, or buyer.¹⁵ Direct marketing is one important method that fruit and vegetable farmers can use to strategically market their crops to reach children.

III. FOCUS OF ANALYSIS

The analysis in this report focuses on the most relevant provisions of the Farm Bill, including parts of the Commodity; Crop Insurance and Disaster Assistance;

the 2008 Farm Bill §§ 7311 (Specialty Crop Research Initiative), 10,001 (Definitions), 10,103 (Inclusion of Specialty Crops in Census of Agriculture), and 10,109 (Specialty Crop Block Grants).

¹¹ 2007 Census of Agriculture, Table 8, available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/index.asp.

¹² 2007 Census of Agriculture: Specialty Crops, Table 1 (2009) (reporting just over 2 million acres of noncitrus fruits, about 1 million acres of citrus fruits, about 260,000 acres of berries, and about 4.4 million acres of vegetables, potatoes, and melons), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Specialty_Crops/spec_crop.pdf.

¹³ See, Farmer-to-Consumer Direct Marketing Act of 1976, Pub. L. No. 94-463, § 3, 90 Stat. 1982 (Oct. 8, 1976) (codified at 7 U.S.C. § 300); Hamilton, THE LEGAL GUIDE FOR DIRECT FARM MARKETING, at 1 (Drake University Agricultural Law Center 1999).

¹⁴ Diamond, et al., “Emerging Market Opportunities for Small-Scale Producers: Proceedings of a Special Session at the 2008 USDA Partners Meeting” (2009), available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName>.

¹⁵ See, e.g., 7 C.F.R. § 457.171 (2010) (Common Crop Insurance Regulations; Cabbage Crop Insurance Provisions).

Horticulture and Organic Agriculture; Credit; Conservation; Research; Rural Development; and Miscellaneous titles. This report does not assess the trade, forestry, energy, livestock, commodity futures, or trade and tax provisions titles of the Farm Bill. With a few exceptions, the report does not look outside the Farm Bill authorized programs, nor does it look beyond programs run by USDA.¹⁶ Thus, for example, it does not address marketing orders, research and promotion programs, or water usage issues related to fruit and vegetable production and marketing.

The Congressional Budget Office estimated the total cost of the 2008 Farm Bill at just under \$284 billion for the federal fiscal years from 2008 through 2012.¹⁷ Of that \$284 billion, about \$42 billion (15 percent) in projected spending will support payment programs for commodity crops, \$22 billion (8 percent) will support crop insurance, and \$189 billion (67 percent) will support the cost of nutrition programs. Thus, these three program categories are expected to account for about 90 percent of all Farm Bill spending.

Given these spending levels, we place our primary focus on these three program types. This report provides a more detailed analysis of the Crop Insurance and Disaster Assistance and Nutrition titles of the Farm Bill because they contain rich possibilities for policy change that promotes healthy food crop production and strategic marketing. The Crop Insurance and Disaster Assistance title is an overlooked driver of decision-making on individual farms and within many agriculture programs. The Nutrition title accounts for nearly two-thirds of Farm Bill spending, but it has often received little attention from farmers, despite the potential for nutrition programs to expand markets without depressing prices.

This report explains how commodity programs work and recommends targeted changes to the principal commodity program's direct restriction on planting fruits and vegetables. Yet, for two reasons, the commodity programs are not the focus of this report. First, the commodity programs have been subject to considerable previous analysis, leaving little ground uncovered. Second, the commodity programs have been the subject of considerable reform efforts in several recent Farm Bills, and have proven remarkably resistant to change. Thus, rather than focusing upon the commodity programs, this report attempts to focus attention on the multiple, often overlooked ways in which federal policies discourage farmers

¹⁶ For an overview of other relevant federal government authorities and programs, see Gosselin, "Beyond USDA: How Other Government Agencies Can Support a Healthier, More Sustainable Food System," Institute for Agriculture and Trade Policy (2010), available at <http://www.iatp.org/iatp/publications.cfm?refid=107172>.

¹⁷ Johnson, et al., "The 2008 Farm Bill: Major Provisions and Legislative Action," at CRS-16, Congressional Research Service Report for Congress (Oct. 3, 2008), available at <http://ncseonline.org/NLE/CRSreports/08Jun/RL33934.pdf>.

from producing and strategically marketing food crops such as fruits and vegetables, and makes recommendations for policy changes to address these problems.

This report draws attention to important policy issues such as: (1) the need to create a safety net to protect fruit and vegetable farmers from natural disasters in a manner comparable to programs that are available for farmers producing major commodity crops such as corn, soybeans, and wheat; (2) the failure to collect fruit and vegetable price and yield data to ensure a robust body of knowledge to guide policy regarding these important sectors of agriculture; (3) the failure to design crop insurance, disaster assistance, loan, and conservation programs to address the unique character of fruit and vegetable production and marketing; and (4) the ways in which expenditures on nutrition programs may be better directed to ensuring that children, including those from low-income households, receive healthy food.

A note on the structure of the report may be helpful. As stated above, the report dedicates its most in-depth analysis to commodity programs, crop insurance and disaster assistance programs, and nutrition programs. The report begins by discussing programs related to agricultural production, and concludes with the programs related to food distribution. The opening sequence of chapters illustrates how the policy of making payments based upon historical production of certain commodities (which thus favors production of those commodities and disfavors production of fruits and vegetables) influences other farm programs. The commodity programs collect data about commodity prices and yields, which provides an actuarially sound basis for crop insurance, and these two types of income assurance then position commodity farmers to be looked upon favorably by agricultural lenders. A policy to encourage farmers to produce and distribute fruits and vegetables will require similarly mutually reinforcing types of support.

IV. SUMMARY OF POLICY DISCUSSION AND RECOMMENDATIONS

Recommendations for policy change are included at the end of each of the chapters discussing specific program areas. In addition, all of the recommendations are gathered together in the final chapter of this report. The following is a summary of key points in the report's analysis and recommendations for policy change.

A. Commodity Title

Previous studies and reports have already begun the analysis of the relationship between federal commodity programs and obesity rates, particularly the extent to which the current form of these programs has helped create a glut of cheap refined

grains, oils, and sweeteners which have become ubiquitous in the American diet.¹⁸ Covered commodities and their products are incorporated into the American diet directly as ingredients in processed foods, as well as indirectly when used as livestock feed in feedlots and confined animal feeding operations in order to produce inexpensive meats.¹⁹ The question of the larger impact of the commodity programs on obesity rates is beyond the scope of this report, which focuses on barriers and incentives for fruit and vegetable production. However, as these other studies have pointed out, one unavoidable result of federal farm policy promoting “cheap and plentiful” commodity crops is that the real prices of grain starches, oils, meats, and sweeteners have increased slowly over the past few decades, while fruits and vegetables have become more expensive, in relative terms, more quickly over time.²⁰

In general, farmers are prohibited from planting and harvesting fruits and vegetables on acres enrolled in the primary commodity payment program, known as the Direct and Counter-cyclical Program.²¹ Most harvested cropland in the United States is enrolled in these programs which make payments to farmers who have a history of growing crops such as corn, soybeans, wheat, oats, barley, rice, and

¹⁸ Muller, et al., “Considering the Contribution of U.S. Food and Agricultural Policy to the Obesity Epidemic: Overview and Opportunities,” IATP (Feb. 2007), available at <http://www.agobservatory.org/library.cfm?RefID=99608>; Institute for Agriculture and Trade Policy, “The Farm Bill and Public Health: An Overview” (Feb. 2007), available at <http://www.iatp.org/iatp/publications.cfm?accountID=421&refID=99606>; Muller, et al., “Aligning Food Systems Policies to Advance Public Health,” *Journal of Hunger & Environmental Nutrition*, 4:3, 225-240 (2009); Wallinga, “Today’s Food System: How Healthy Is It?,” *Journal of Hunger & Environmental Nutrition*, 4:3, 251-281 (2009); Jackson, et al., “Agriculture Policy Is Health Policy,” *Journal of Hunger & Environmental Nutrition*, 4:3, 393-408 (2009); Harvie, et al., “A New Health Care Prevention Agenda: Sustainable Food Procurement and Agricultural Policy,” *Journal of Hunger & Environmental Nutrition*, 4:3, 409-429 (2009); Sturm, “Affordability and Obesity: Issues in the Multifunctionality of Agricultural/Food Systems,” *Journal of Hunger & Environmental Nutrition*, 4:3, 454-465 (2009).

¹⁹ Jackson, et al., “Agriculture Policy Is Health Policy,” *Journal of Hunger & Environmental Nutrition*, 4:3, at 402 (2009). For popular accounts of how agricultural policy contributed to unhealthy American diets, see Pollan, *OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (Penguin Press, 2006); Schlosser, *FAST FOOD NATION* (Penguin Books, 2005).

²⁰ See chart at page 21 of Muller, et al., “Considering the Contribution of U.S. Food and Agricultural Policy to the Obesity Epidemic: Overview and Opportunities,” IATP (Feb. 2007), available at <http://www.agobservatory.org/library.cfm?RefID=99608>.

²¹ 7 U.S.C. § 8717. The Farm Bill created a pilot project to allow planting some vegetables for processing on base acres. 2008 Farm Bill § 1107(d).

cotton, and penalize farmers for growing fruits and vegetables on enrolled acres.²² The commodity programs, however, have effects that go well beyond the direct encouragement to grow nonperishable commodities and direct penalties for growing fruits and vegetables. For example, in the course of making payments under the commodity programs, USDA has developed a body of knowledge about historical yields and prices for the covered crops that enables the federal government and private entities to more confidently offer loans and financing, as well as crop insurance and other risk management tools, to farmers producing commodity crops.

Eliminating the commodity program restriction on planting fruits and vegetables on program acres might seem an obvious solution to increase the supply of fruits and vegetables. Among fruit and vegetable farmers themselves, there is disagreement about the extent to which the fruit and vegetable planting restrictions in the commodity payment programs represent sound policy.²³ Some current fruit and vegetable farmers have opposed changes to the fruit and vegetable planting restrictions, due to concerns about the effect that changes might have on prices they receive for their fruit and vegetable crops. In particular, if supply increased and demand did not increase at the same rate, wholesale prices would likely fall, and some farming operations might no longer be profitable. These farms might cease production, which could result in a contraction in supply. Other fruit and vegetable farmers argue that eliminating the planting restrictions could dramatically increase access to land for fruit and vegetable farmers seeking to engage in direct marketing, which might not have any disruptive effect on national wholesale markets.

Beyond the planting restrictions under commodity program rules, other barriers rooted in agricultural policy and the practicalities of farming may play a significant role in dissuading farmers from switching to fruit and vegetable production.²⁴ Such barriers include: the need for specialized equipment and expertise, labor for harvesting, higher production costs, more complicated production practices, greater production and price risk, agronomic constraints (limited season, water, etc.), need to negotiate a processing or marketing contract, uncertain proximity to a processing

²² “USDA Enrolls 255 Million Base Acres in DCP & ACRE on 1.7 Million Farms,” USDA Press Release No. 0519.09 (Oct. 20, 2009).

²³ See, e.g., Hedin, “My Forbidden Fruits (and Vegetables),” *New York Times* (Mar. 1, 2008), available at http://www.nytimes.com/2008/03/01/opinion/01hedin.html?_r=1. Compare, Brim, Statement before the U.S. Senate Committee on Agriculture, Forestry and Nutrition (April 24, 2007), available at <http://agriculture.senate.gov/Hearings/hearings.cfm?hearingid=2723&witnessId=6359>.

²⁴ See, e.g., Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?” at 15, 37, Economic Research Report No. 30, ERS, USDA (Nov. 2006), at http://www.ers.usda.gov/publications/err30/err30_lowres.pdf.

plant or market for fresh produce, and difficulty accessing credit.²⁵ Yet the experience of states such as North Carolina and Kentucky in assisting farmers to transition from producing commodities such as tobacco to producing specialty crops is evidence that successful transitions can be made, if adequate policy and practical assistance are in place.

Our recommendations regarding commodity programs focus on developing targeted changes to the fruit and vegetable planting restrictions for incorporation in the next Farm Bill. An example of such a targeted reform is to allow acre-for-acre reductions in commodity program payments when fruits and vegetables are grown on the enrolled acres and would be direct marketed to consumers, local schools, grocery stores, or restaurants.

B. Crop Insurance and Disaster Assistance Title

Farmers are highly dependent upon, and vulnerable to, the vagaries of weather. This has enormous policy implications. According to a 2009 USDA fact sheet, “One-half to two-thirds of the counties in the United States have been designated as disaster areas in each of the past several years.”²⁶ Many fruit and vegetable crops are acutely sensitive to slight changes in the weather.²⁷ Creating a means for farmers to manage risk is essential if non-farmers are to embrace farming, and if farmers who suffer losses are to be able to continue farming.

Crop insurance is the most well-developed tool for managing weather-related risks. But it does not provide universal coverage. Where it is well-developed and supported by actuarial data, crop insurance is a highly effective risk management tool, allowing farmers to insure as much as 85 percent of their expected crop yields and up to 100 percent of their expected crop prices.²⁸ However, the crops for which

²⁵ Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?,” at 15, 37, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

²⁶ Farm Service Agency Fact Sheet, “Emergency Disaster Designation and Declaration Process” (July 2009), available at www.fsa.usda.gov/Internet/FSA_File/disaster09.pdf.

²⁷ The marketable yield of horticultural crops such as tomatoes, onions, and fruits is very likely to be more sensitive to climate change than grain and oilseed crops. Hauser, et al., “The Effects of Climate Change on U.S. Ecosystems,” at 7 (Nov. 2009), available at <http://www.usda.gov/img/content/EffectsofClimateChangeonUSEcosystem.pdf>.

²⁸ The 2008 Farm Bill authorized USDA to renegotiate the standard reinsurance agreement with private crop insurance providers, making crop insurance reform a topic of increasing debate, as both government costs and insurance provider returns have increased. 2008 Farm Bill § 12017 (codified at 7 U.S.C. § 1508(k)). Shields, “Renegotiation of the Standard Reinsurance Agreement for Federal Crop Insurance,” Congressional Research Service

there are well-developed data regarding prices and yields are, by and large, the same crops that benefit from the commodity programs. Thus, for many fruits and vegetables, there are no individual crop insurance policies available. Often these crops are only eligible for catastrophic coverage under the Non-insured Crop Disaster Assistance Program (NAP) that would cover at most 27.5 percent of the value of a total loss.²⁹ Precisely because crop insurance relies upon historical data, it presents a challenge in managing risk for the most innovative farmers—those who may wish to transition to growing fruits and vegetables, to pursuing organic certification, or to supplying crops to local consumers and institutions at retail prices.

The 2008 Farm Bill authorized a number of new disaster assistance programs, some of which are just beginning to grapple with these challenges. In particular, the Supplemental Revenue Assistance Payment Program (SURE) adds to crop insurance and NAP coverage. SURE begins to acknowledge that crop insurance and NAP have not provided universal coverage. Yet the fundamental problem remains of how to build rich price and yield data sets for crops that have traditionally been at the margins of these programs, including fruit and vegetable crops. This dilemma must be resolved if the United States is to create a set of mutually reinforcing incentives for farmers to grow fruits and vegetables.

Our recommendations for policy changes related to crop insurance and disaster assistance programs focus on the need for USDA to: (1) collect and use more accurate fruit and vegetable crop price and yield data that reflect each particular crop type, variety, production practice, and intended use or marketing channel; (2) provide crop insurance and disaster assistance program coverage for fruits and vegetables equivalent to that provided for nonperishable commodities; (3) allow fruit and vegetable farmers to purchase “buy-up” or increased coverage beyond that for catastrophic crop losses; (4) streamline acreage and production reporting and recordkeeping requirements; and (5) continue to develop and refine whole farm revenue crop insurance products. In addition, Congress and USDA should develop incentives for farmers to utilize farming practices (such as crop diversification, crop rotation, soil conservation, and crop type and variety selection) that increase resilience in the face of natural disaster and climate change.

Report for Congress (Dec. 9, 2009), available at <http://www.nationalaglawcenter.org/assets/crs/R40966.pdf>.

²⁹ One highly diversified farmer who sold organic vegetables at farmers’ markets, through community supported agriculture, and to restaurants and food cooperatives reported that his initial NAP payment following very severe losses represented about 2 percent of his expected income from the lost crops. NAD Director Determination No. 2008E000455 (October 22, 2008), available at www.nad.usda.gov.

C. Nutrition Title

Three types of nutrition programs are most relevant to farmers and their planting and marketing choices. The first type includes programs like the Supplemental Nutrition Assistance Program (SNAP, formerly known as the Food Stamp Program) and the Farmers' Market Nutrition Program, in which farmers may sell directly to program participants, who purchase the farmer's goods using program benefits. The second type of program includes those in which farmers sell their goods to USDA or another government entity for use in nutrition programs, such as The Emergency Food Assistance Program (TEFAP) and the National School Lunch Program. The third type of program awards grants to support food production and distribution in low-income communities, as in the Community Food Program.

Our analysis of these nutrition programs is guided by five central questions.³⁰ First, we examine which foods may be purchased with nutrition program funds, and whether the program is narrowly tailored to focus upon fresh fruits and vegetables. Second, we examine whether farmers are authorized to act as vendors. Third, we examine whether the nutrition program is most accessible to large-, medium-, or small-scale farmers. Fourth, we examine whether state, local, and private incentives to encourage use of nutrition program benefits for the purchase of fresh, local, healthy foods have been impeded by program regulations. Fifth, we examine whether the nutrition program requires or allows a preference for foods that are locally produced.

Our recommendations regarding nutrition programs address each type of program separately. Some of the key recommendations designed to promote production and strategic marketing of fruits and vegetables to encourage healthy diets for children focus on the need to: (1) increase overall funding and individual benefit levels for nutrition assistance programs, especially those that target benefits to purchases of fruits and vegetables; (2) amend SNAP regulations or USDA interpretation of the regulations to allow and promote incentive projects that encourage recipients to use benefits to purchase fruits and vegetables; (3) address cost and technology barriers to farmers' use of Electronic Benefit Transfer; (4) expand efforts to assist small farmer-owned cooperatives and rural businesses in winning federal contracts to supply fruits and vegetables; (5) require that an appropriate proportion of USDA procurement dollars be used to purchase fruits and vegetables; and (6) take actions that promote purchases of more fruits and vegetables from local farmers through the Farm to School programs.

³⁰ Compare "State Indicator Report on Fruits and Vegetables, 2009," a report by the Centers for Disease Control and Prevention, available at http://fruitsandveggiesmatter.gov/health_professionals.statereport.html and <http://www.fruitsandveggiesmatter.gov/downloads/StateIndicatorReport2009.pdf>.

D. Agriculture Loan Programs

In discussing USDA's farm loan programs, we explain how USDA's failure to collect and publish crop price data that accurately reflect prices paid for fruits and vegetables sold through the diverse marketing channels has made it difficult for fruit and vegetable producers to substantiate their income projections to obtain loan approval. Without loans to buy or rent land or to buy seed and equipment, much potential fruit and vegetable production will not take place. Our recommendations for policy change therefore focus on: (1) collection, publication, and use in the loan approval process of crop price and yield data that accurately reflect the particular marketing channels and production methods used by the loan applicant; (2) streamlining loan application and reporting forms for farmers producing multiple fruit and vegetable crops in a single growing season; (3) training Farm Service Agency staff and guaranteed lender representatives to more accurately assess fruit and vegetable farmers' loan applications; and (4) targeting and providing more effective technical assistance to fruit and vegetable farmers.

E. Conservation Programs

In the conservation programs chapter, we briefly describe some of the ways that USDA conservation programs fail to equitably address the needs of many fruit and vegetable farmers. Our recommendations for policy change focus on: (1) increasing and targeting a portion of the funding for working lands conservation programs to more effectively promote participation by fruit and vegetable farmers; (2) recruiting fruit and vegetable farmers and specialists to sit on advisory and decision-making committees for the conservation programs; (3) prioritizing funding of conservation practices used by fruit and vegetable growers; and (4) conducting outreach and training to promote greater conservation program participation by these farmers.

F. USDA Research Programs

In addressing needed research that could be funded or directly conducted by USDA's research agencies, we again recommend comprehensive collection of data on fruit and vegetable crop prices for all relevant production methods and markets, including wholesale, retail, and direct marketing channels. We also recommend increasing specialty crop research funding and devoting more, and appropriately directed, funding for research on different fruits and vegetables and for organic crop production.

Chapter 9 of this report sets out suggestions for additional research priorities.

G. Rural Development, Outreach, and Beginning Farmer Programs

After briefly summarizing important rural development, outreach, and beginning farmer development programs, we recommend: (1) quantifying fruit and vegetable farmers' participation in and benefits from these programs; (2) further targeting programs to fruit and vegetable production and strategic marketing; and (3) increasing financial and program support for these programs.

H. Increase Efforts to Collect Data Regarding Fruits and Vegetables

This report identifies the lack of comprehensive, accurate crop- and market-specific information about fruits and vegetables as one of the biggest obstacles to developing effective programs to promote their production and strategic marketing by farmers. The markets for fruits and vegetables are numerous and varied. It is crucial that Congress appropriate sufficient resources to enable USDA to immediately begin collecting, publishing, and using in program implementation decisions more detailed information about specific fruit and vegetable crop prices and yields. This data should accurately reflect crop types and varieties as well as any market-distinguishing production methods, such as organic production, and whether the crop is sold at wholesale, retail, or direct marketed, and for fresh use or for further processing.

I. Transparent, Participatory, and Fair Program Implementation

As the 2008 Farm Bill programs are implemented, it is important that USDA maintain a transparent, participatory, and fair process. USDA should engage in full notice and comment rulemaking procedures by publishing proposed rules for each program in the *Federal Register* seeking public comment before the rules are finalized.³¹ Even when authorized by Congress, truncating or omitting this public participation process is likely to result in less effective programs.

Administrative appeals also play an important role in ensuring that Farm Bill programs are administered fairly. Appeals enable individual farmers to seek redress from adverse agency decisions. This is especially true for fruit and vegetable farmers whose local USDA officials, due to their historically limited experience in dealing with fruit and vegetable production, may not properly account for the unique character of these types of farming operations. When numerous appeals related to the same issue are filed, they often point to a need for systemic policy change. In implementing Farm Bill-authorized programs, the Secretary of Agriculture should ensure the integrity of the administrative appeals system and provide meaningful oversight of agency implementation of appeal decisions.

³¹ Where time is of the essence, an interim final rule may be published, allowing for timely program implementation, yet still providing opportunity for public participation.

J. Partners in Promoting a Multi-Program Approach

USDA's "Know Your Farmer, Know Your Food" initiative gathers information about a wide variety of USDA programs at a central website location in an effort to create new economic opportunities by better connecting consumers with local producers and to support a national conversation about the importance of understanding where food comes from and how it gets to our plates.³² This initiative may help enable farmers and their communities to tap existing program resources in creative ways to better grow crops for human consumption, build new marketing systems, and satisfy research needs. Yet it is important to be mindful of obstacles that continue to discourage farmers from growing fruits and vegetables. The very profusion of small, experimental programs can obscure the bigger picture which includes a lack of sufficient resources dedicated to programs that promote production and strategic marketing of fruits and vegetables. For farmers to successfully play their important role in fighting childhood obesity, more resources from Congress and USDA must be directed toward fruit and vegetable production and marketing.

State and local policy approaches also contribute to increased production of healthy foods by farmers and gardeners.³³ Nongovernmental organizations make substantial contributions toward information-sharing through publications, conferences, and e-mail listservs.³⁴ USDA should continue to seek opportunities to partner with nongovernmental organizations in these efforts, and to replicate and expand successful state and local efforts.³⁵

V. RESEARCH METHODS

This report began with traditional legal research, and then moved into policy analysis. We reviewed the fifteen titles of the Farm Bill and studied the conference report by the managers of the Farm Bill. We examined analyses from agricultural lawyers and agricultural economists. We monitored the *Federal Register* for regulations implementing Farm Bill provisions and compared them to the Farm Bill

³² Available at www.usda.gov/knowyourfarmer.

³³ Bailkey, et al., "Food and Agriculture Related Policies and Practices to Benefit Limited Resource Farmers," (Community Food Security Coalition, 2007), available at www.foodsecurity.org/LRPreport.pdf.

³⁴ For an excellent example, see Baker, et al., "Grassroots Guide to the 2008 Farm Bill," (Sustainable Agriculture Coalition, 2009).

³⁵ For an example of one such collaborative effort, see Krome, et al., "Building Sustainable Farms, Ranches, and Communities: Federal Programs for Sustainable Agriculture, Forestry, Entrepreneurship, Conservation and Community Development" (2009), available at http://attra.ncat.org/guide/Building_Sustainable.pdf.

language in order to evaluate USDA’s interpretation of key program requirements, such as those governing program eligibility and benefits.

All of our review, assessment, and analysis was informed by the Farmers’ Legal Action Group’s mission to support family farmers.³⁶ Accordingly, we incorporated into our research dialogue with farmers and farm advocates—in person, via telephone, and electronically through e-mail and a number of dynamic listservs—that captured the rapidly developing conversation and experience of those who are creating successful experiments in healthy food production and marketing.³⁷

VI. CONCLUSION

There are many opportunities for public health advocates and the farming community to work together and build support for national policies to achieve the broadly shared goal of ensuring a plentiful supply of healthy foods for our children. The rapidly growing support for and re-emergence of local and regional food systems, through which farmers are selling their produce directly within their local communities, is leading to new policies that will further promote this healthy trend in food production and distribution.

This is an opportune time to conduct research, engage in dialogue, form relationships with new partners, and build consensus to improve implementation of the 2008 Farm Bill and develop policy goals for the next Farm Bill.

This project was funded through a grant from Healthy Eating Research, a national program of the Robert Wood Johnson Foundation. Farmers’ Legal Action Group is grateful for the opportunity to further the national dialogue regarding how federal agriculture and nutrition policy can promote farmers’ production and strategic marketing of healthy food crops, such as fruits and vegetables, so as to ensure children have ready access to a healthy diet.

³⁶ Carpenter, “The Importance of Family Farms Today,” Farmers’ Legal Action Group (2006), available at http://www.flaginc.org/pubs/arts/CLE_SC.pdf. See also, Schneider, “A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability,” 34 Wm & Mary Env’tl. L. & Pol’y Rev. (forthcoming 2010). For a classic articulation of reasons to support family farming, see Strange, *FAMILY FARMING: A NEW ECONOMIC VISION*, (University of Nebraska Press and Institute for Food and Development Policy, 1988).

³⁷ Among the most useful weekly e-mails and listservs we reviewed and participated in are: National Sustainable Agriculture Coalition Weekly Update, <http://sustainableagriculture.net>; COMFOOD, www.foodsecurity.org/list.html; Refugee Agricultural Partnership Project, www.ised.us/projects/rapp; and Growing Food and Justice, www.growingfoodandjustice.org.

Chapter 2

Commodity Programs

I. INTRODUCTION

The Commodity Title is typically the second-largest, by budget outlays, of every Farm Bill, after the Nutrition Title. The Congressional Budget Office projected that approximately \$42 billion would be spent under the Commodity Title of the 2008 Farm Bill during Fiscal Years 2008 through 2012, out of \$284 billion in total projected 2008 Farm Bill outlays during that period.¹ Because of the large amount of money involved and these programs' relatively high profile, the commodity payment programs are often the first thing that comes to mind when federal farm policy, particularly reform of federal farm policy, is discussed. This chapter will provide an overview of the current federal commodity payment programs and will begin the discussion of whether changes to the aspects of these programs that act as direct disincentives for fruit and vegetable production could be expected to significantly increase production and availability of fruits and vegetables.

It is important to note that several studies have already begun the analysis of the relationship between federal commodity programs and obesity rates, particularly the extent to which the current form of these programs has helped create a glut of cheap refined grains, oils, and sweeteners which have become ubiquitous in the American diet.² Covered commodities and their products are incorporated into the

¹ Johnson, et al., "The 2008 Farm Bill: Major Provisions and Legislative Action" at CRS-8, Congressional Research Service Report for Congress (Oct. 3, 2008), available at <http://ncseonline.org/NLE/CRSreports/08Jun/RL33934.pdf>.

² Muller, et al., "Considering the Contribution of U.S. Food and Agricultural Policy to the Obesity Epidemic: Overview and Opportunities," IATP (Feb. 2007), available at <http://www.agobservatory.org/library.cfm?RefID=99608>; Institute for Agriculture and Trade Policy, "The Farm Bill and Public Health: An Overview" (Feb. 2007), available at <http://www.iatp.org/iatp/publications.cfm?accountID=421&refID=99606>; Muller, et al., "Aligning Food Systems Policies to Advance Public Health," *Journal of Hunger & Environmental Nutrition*, 4:3, 225-240 (2009); Wallinga, "Today's Food System: How Healthy Is It?," *Journal of Hunger & Environmental Nutrition*, 4:3, 251-281 (2009); Jackson, et al., "Agriculture Policy Is Health Policy," *Journal of Hunger & Environmental Nutrition*, 4:3, 393-408 (2009); Harvie, et al., "A New Health Care Prevention Agenda: Sustainable Food Procurement and Agricultural Policy," *Journal of Hunger & Environmental Nutrition*, 4:3, 409-429 (2009); Sturm, "Affordability and

American diet directly as ingredients in processed foods, as well as indirectly when used as livestock feed in feedlots and confined animal feeding operations in order to produce inexpensive meats.³ The question of the larger impact of the commodity programs on obesity rates is beyond the scope of this report, which focuses on barriers and incentives for fruit and vegetable production. However, as these other studies have pointed out, one unavoidable result of federal farm policy promoting “cheap and plentiful” commodity crops is that the real prices of grain starches, oils, meats, and sweeteners have increased slowly over the past few decades, while fruits and vegetables have become more expensive, in relative terms, more quickly over time.⁴

II. AN OVERVIEW OF THE CURRENT FEDERAL FARM COMMODITY PROGRAMS

To understand how federal farm commodity programs might affect the production of fruits and vegetables, it is first necessary to understand the basics of those programs. Throughout this discussion, it is important to remember that the terms “commodity” or “program crop” refer only to the grains, beans, oilseed, and other crops explicitly covered by these programs and do not include fruits and vegetables.

As noted above, this report focuses on the current form of the commodity programs and only briefly addresses their historical development. A thorough discussion of the economic rationale for and development of the federal commodity programs is beyond the scope of this report. Yet it is important to recognize that the many iterations of these programs over the past century have been attempts to address fundamental market failures that are inherent in the production of non-perishable commodities and to secure a plentiful domestic food supply.⁵ Persuasive arguments have been made that the programs have gone awry

Obesity: Issues in the Multifunctionality of Agricultural/Food Systems,” *Journal of Hunger & Environmental Nutrition*, 4:3, 454-465 (2009).

³ Jackson, et al., “Agriculture Policy Is Health Policy,” *Journal of Hunger & Environmental Nutrition*, 4:3, at 402 (2009). For popular accounts of how agricultural policy contributed to unhealthy American diets, see Pollan, *OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (Penguin Press, 2006); Schlosser, *FAST FOOD NATION* (Penguin Books, 2005).

⁴ See chart at page 21 of Muller, et al., “Considering the Contribution of U.S. Food and Agricultural Policy to the Obesity Epidemic: Overview and Opportunities,” IATP (Feb. 2007), available at <http://www.agobservatory.org/library.cfm?RefID=99608>.

⁵ See generally “History of Agricultural Price-Support and Adjustment Programs, 1933-84: Background for 1985 Farm Legislation,” Economic Research Service, USDA (Dec. 1984), available at <http://www.ers.usda.gov/publications/aib485/aib485.pdf>; Monke, “Farm Commodity Programs: Direct Payments, Counter-Cyclical Payments, and

under recent Farm Bills as they have departed from their original purposes.⁶ For example, as farm sizes have increased, commodity program payments are increasingly directed toward higher-income households.⁷

Yet for two reasons, a major reform of the commodity programs is not the focus of this chapter. First, the commodity programs have been subject to considerable previous analysis, leaving little ground uncovered. Second, the commodity programs have been the subject of considerable reform efforts during the development of several recent Farm Bills, and have proved remarkably resistant to change. This chapter explains how commodity programs work and recommends targeted changes to the direct restriction on planting fruits and vegetables. This report as a whole explores other areas of federal agricultural policy where reform efforts aimed at increasing production and marketing of fruits and vegetables may prove more fruitful.

A. Origins of the Current Programs

To the extent most Americans give any thought to federal farm commodity programs, there tends to be a lot of confusion. It is not uncommon to still hear reference to supply management concepts (e.g., “paying farmers not to farm”) when the topic of federal farm policy comes up in general conversation. It is true that today’s commodity programs are the descendants of price support programs first enacted in the 1930s with the goal of using supply management to set a floor on commodity prices and, as a result, protect a minimum level of farm income.⁸

Marketing Loans,” Congressional Research Service Report for Congress (Mar. 1, 2006), available at <http://www.nationalaglawcenter.org/assets/crs/RL33271.pdf>.

⁶ Ray, “1996 Farm Bill: A Pattern for Future Legislation or Failed Experiment,” Agricultural Policy Analysis Center, University of Tennessee (Oct. 2001), available at <http://agpolicy.org/pubs/nd.pdf>; Olson, “Farm Bill a Missed Opportunity,” IATP (May 13, 2008), available at <http://www.iatp.org/iatp/commentaries.cfm?refID=102665>. See also, Marlow, “The Farm Bill Tree: Understanding the Logic of the Farm Bill,” RAFI-USA (Apr. 17, 2007), available at <http://www.rafiusa.org/docs/Farm%20Bill%20Tree.pdf>; and Marlow, “The Non-Wonk Guide to Understanding Federal Commodity Payments,” RAFI-USA (2005), available at <http://www.rafiusa.org/pubs/nonwonkguide>.

⁷ MacDonald, et al., “Growing Farm Size and the Distribution of Farm Payments,” USDA Economic Research Service, Economic Brief No. 6, (March 2006), available at <http://www.ers.usda.gov/publications/EB6/EB6.pdf>.

⁸ Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (May 12, 1933); see generally “History of Agricultural Price-Support and Adjustment Programs, 1933-84: Background for 1985 Farm Legislation,” Economic Research Service, USDA (Dec. 1984), available at <http://www.ers.usda.gov/publications/aib485/aib485.pdf>.

Similar programs were enacted and amended repeatedly over the next several decades.⁹ Beginning in the mid-1960s, however, Congress began mixing these commodity price support programs (which had an acreage set-aside or other supply management component) with direct farm income support programs (which were not specifically aimed at supply management).¹⁰ The connection between commodity supply management and farmers' eligibility for commodity payments was finally severed with the enactment of the 1996 Farm Bill and its "decoupled" commodity payment program.¹¹

The 1996 Farm Bill eliminated the commodity payment programs based on supply management principles and replaced them with direct payment programs. Farmers with a history of producing eligible commodities¹² entered into "Production Flexibility Contracts" and received fixed annual payments during the seven-year term of the 1996 Farm Bill, payments that were tied neither to market prices nor to the farmers' acreage or crops in production during the years payments were received.¹³ The only planting restrictions were that a farmer could not grow fruits or vegetables on acreage used as part of the farmer's planting history when determining payment eligibility (so-called "base acreage").¹⁴

⁹ Major acts include: Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (Feb. 16, 1938); Agricultural Act of 1949, Pub. L. No. 81-439, 63 Stat. 1051 (Oct. 31, 1949); Agricultural Act of 1954, Pub. L. No. 83-690, 68 Stat. 897 (Aug. 28, 1954); Food and Agriculture Act of 1962, Pub. L. No. 87-703, 76 Stat. 605 (Sept. 27, 1962); Agricultural Act of 1970, Pub. L. No. 91-524, 84 Stat. 1358 (Nov. 30, 1970); Food and Agriculture Act of 1977, Pub. L. No. 95-113, 91 Stat. 913 (Sept. 29, 1977); Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (Dec. 23, 1985); and the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (Nov. 28, 1990).

¹⁰ Food and Agriculture Act of 1965, Pub. L. No. 89-321, Title III, 79 Stat. 1187 (Nov. 3, 1965); Agricultural Act of 1970, Pub. L. No. 91-524, Title V.

¹¹ Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, Title I, 110 Stat. 888 (Apr. 4, 1996).

¹² For the 1996 Farm Bill program, eligible commodities were wheat, corn, barley, grain sorghum, oats, upland cotton and rice. 1996 Farm Bill § 102(5) (codified at 7 U.S.C. § 7202(5)).

¹³ See 7 C.F.R. pt. 1412 (2002), "Production Flexibility Contracts for Wheat, Feed Grains, Rice, and Upland Cotton." PFC payments were also referred to as "AMTA payments" for the Agricultural Market Transition Act, the name for the Commodity Title in the 1996 Farm Bill.

¹⁴ 1996 Farm Bill § 118(b) (codified at 7 U.S.C. § 7218(b)).

The 1996 Farm Bill was debated and enacted during a period of high commodity prices worldwide.¹⁵ Expecting those prices to continue and even increase, Congress designed the new direct PFC payments to decline each year over the term of the 1996 Farm Bill as farmers would exercise their planting flexibility to maximize market opportunities and reduce, and ultimately eliminate, their dependence on income support from USDA.¹⁶ Instead, however, commodity prices collapsed in the late 1990s due to high production in the U.S. and abroad.¹⁷ Congress responded by appropriating billions for emergency “market disaster” payments, amounting to more than \$18 billion over four years.¹⁸ As Muller, et al., noted, Congress had replaced policies intended to stabilize farm commodity prices with policies that encouraged overproduction, and then “simply made payments to farmers to make up the difference between what the ‘market’ would pay and what farmers needed to stay in business.”¹⁹

¹⁵ Young and Westcott, “The 1996 U.S. Farm Act Increases Market Orientation,” at 2, Economic Research Service, USDA, AIB-726, available at <http://www.ers.usda.gov/publications/aib726/AIB726a.pdf>; Muller, et al., “Considering the Contribution of U.S. Food and Agricultural Policy to the Obesity Epidemic: Overview and Opportunities,” at 15, IATP (Feb. 23, 2007), available at <http://www.agobservatory.org/library.cfm?RefID=99608>.

¹⁶ Under the 1996 Farm Bill, scheduled payments for major field crops decreased from a high of \$6.4 billion in calendar year 1997 to \$4 billion in calendar year 2001. ERS Briefing Room, “Farm and Commodity Policy: Government Payments and the Farm Sector,” available at <http://www.ers.usda.gov/Briefing/FarmPolicy/gov-pay.htm>.

¹⁷ Womach, “Support Programs for Major Crops: Description and Experience,” Congressional Research Service Report for Congress (July 20, 1998), available at <http://ncseonline.org/NLE/CRSreports/Agriculture/ag-79.cfm>; ERS Briefing Room, “Farm and Commodity Policy: Government Payments and the Farm Sector,” available at <http://www.ers.usda.gov/Briefing/FarmPolicy/gov-pay.htm>.

¹⁸ Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, Title I, § 1111, 112 Stat. 2681 (Oct. 21, 1998) (\$2.9 billion to Production Flexibility Contract holders for loss of markets for the 1998 crop); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-78, Title VIII, § 802, 113 Stat. 1135 (Oct. 22, 1999) (\$5.5 billion in market loss payments to compensate Production Flexibility Contract holders for low market prices); Agriculture Risk Protection Act of 2000, Pub. L. No. 106-224, Title II, § 201, 114 Stat. 358 (June 20, 2000) (\$5.5 billion in market loss payments to Production Flexibility Contract holders); Fiscal Year 2001 Supplemental Authorization for Agriculture, Pub. L. No. 107-25, § 1, 115 Stat. 201 (Aug. 13, 2001) (\$4.6 billion to Production Flexibility Contract holders for market loss assistance).

¹⁹ Muller, et al., “Considering the Contribution of U.S. Food and Agricultural Policy to the Obesity Epidemic: Overview and Opportunities,” at 15, IATP (Feb. 23, 2007), available at <http://www.agobservatory.org/library.cfm?RefID=99608>.

With the 2002 Farm Bill, Congress abandoned the pretense that commodity farmers would transition away from needing federal payments. Instead, the 2002 Farm Bill established a new two-part income support program for commodity crops, providing for both fixed annual payments and additional “counter-cyclical” payments in years when the market price for a particular commodity fell below a set level.²⁰ Eligibility for this new Direct and Counter-Cyclical Program (DCP) was expanded to provide payments for oilseeds and peanuts as well as the traditional commodities.²¹ Once again, a farmer’s payments under the program were based on having a history of planting eligible commodity crops, with no connection to current planting choices.²² The new program continued the prohibition on growing fruits and vegetables on base acreage.²³

B. Commodity Programs in Effect Under the 2008 Farm Bill

The 2008 Farm Bill continued the Direct and Counter-Cyclical Program (DCP).²⁴ It also continued authorization for Marketing Assistance Loans and Loan Deficiency Payments.²⁵ The 2008 Farm Bill also created a new commodity support program, called the Average Crop Revenue Election (ACRE) Program, which is a hybrid of commodity payment and crop revenue insurance.²⁶ Participation in ACRE is optional and will result in a reduction in payment eligibility under the other commodity payment programs.

1. Direct and Counter-Cyclical Program

The Direct and Counter-Cyclical Program (DCP) was first created under the 2002 Farm Bill and continued with few changes under the 2008 Farm Bill. As the name implies, this program has two components—a direct payment which is paid out

²⁰ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, Title I, Subtitle A, 116 Stat. 134 (May 13, 2002).

²¹ For the 2002 Farm Bill program, eligible commodities were wheat, corn, grain sorghum, barley, oats, cotton, rice, peanuts, soybeans, sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, other oilseeds designated by USDA, wool, mohair, honey, dry peas, lentils, and small chickpeas. 2002 Farm Bill § 1001(8), (9), and Subtitle C (codified at 7 U.S.C. §§ 7901(8), (9), 7951).

²² 2002 Farm Bill § 1101 (codified at 7 U.S.C. § 7911). Farmers who had participated in the Production Flexibility Contract program were able to update their base acreage when enrolling in DCP.

²³ 2002 Farm Bill § 1106 (codified at 7 U.S.C. § 7916).

²⁴ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title I, Subtitle A, 122 Stat. 1651 (June 18, 2008).

²⁵ 2008 Farm Bill, Title I, Subtitle B.

²⁶ 2008 Farm Bill § 1105 (codified at 7 U.S.C. § 8715).

for each year that an eligible farmer is enrolled in the program, and a counter-cyclical payment which is paid out only when the price for a covered commodity falls below a pre-established threshold.

a. Direct Payments

Direct payments under DCP are income support payments not tied to a farmer's current production or to commodity prices. The farmer is not required to grow anything on the acreage in order to be eligible for payment, though the land must be kept in agricultural or conservation use.²⁷ A farmer is not prohibited from planting anything on the payment acreage except, as discussed in more detail below, fruits, vegetables, and wild rice.²⁸

From 2008 to 2012, eligible farmers may enroll in DCP each year and receive a direct payment based on a payment rate specified in the 2008 Farm Bill and their individual history—both acreage and yields—of planting eligible crops. The payment rates for DCP direct payments remain the same as under the 2002 Farm Bill, while the historical acreage that is eligible for payment was reduced after 2008 from 85 percent to 83.3 percent, and will rise to 85 percent again for 2012, the final year of the 2008 Farm Bill programs.²⁹ As discussed below, DCP direct payment rates are reduced by 20 percent for farmers who chose to participate in the new ACRE program.³⁰

A DCP direct payment is the product of the statutory payment rate for the crop, the farm's historical yield for the crop, and the eligible acreage for the crop (either 85 percent or 83.3 percent of the farmer's historical acreage).³¹

The payment limit on DCP direct payments is \$40,000 per person per crop year for farmers not participating in ACRE.³²

USDA's Economic Research Service estimates that outlays for DCP direct payments will be \$4.955 billion for 2009, compared to \$5.11 billion in 2008, and \$4.810 billion forecasted for 2010.³³

²⁷ 7 U.S.C. § 8716(a)(1)(D).

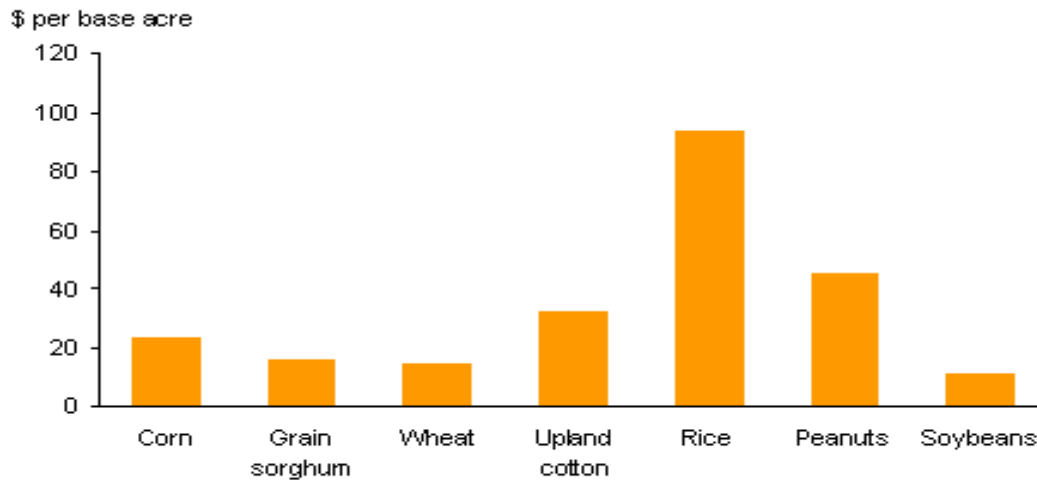
²⁸ 7 U.S.C. § 7916.

²⁹ Johnson, et al., "The 2008 Farm Bill: Major Provisions and Legislative Action" at CRS-11, Congressional Research Service Report for Congress (Oct. 3, 2008), available at <http://ncseonline.org/NLE/CRSreports/08Jun/RL33934.pdf>.

³⁰ 7 U.S.C. § 8715.

³¹ 7 U.S.C. § 8713.

³² 7 U.S.C. § 1308(b)(1)(A).

Direct payments for crop year 2008/09

Sources: Compiled by USDA, Economic Research Service, from USDA, Farm Service Agency and USDA, National Agricultural Statistics Service data.

b. Counter-Cyclical Payments

Counter-cyclical payments under DCP are designed to supplement farm income when markets are in a down cycle and are therefore only triggered when commodity prices fall below an established target price.³⁴ Although counter-cyclical payments are triggered by and tied to the current market price for a commodity, eligibility and payment calculations are still based on the farmer's historical acreage and yield for a crop rather than current production decisions.

The 2008 Farm Bill increased the counter-cyclical target prices for several commodities, slightly reduced the target price for cotton, and added four new crops.³⁵ Counter-cyclical payments are not available to farmers who participate in the new ACRE program, discussed below.³⁶

A DCP counter-cyclical payment is the product of the farm's historical yield for the crop, the eligible acreage for the crop (85 percent of the farmer's historical acreage), and the counter-cyclical payment rate.³⁷ The counter-cyclical payment

³³ Farm Sector Income Forecast, Economic Research Service, USDA, available at http://www.ers.usda.gov/Briefing/FarmIncome/Data/GP_T6.htm.

³⁴ 7 U.S.C. § 8714(a).

³⁵ Johnson, et al., "The 2008 Farm Bill: Major Provisions and Legislative Action" at CRS-11, Congressional Research Service Report for Congress (Oct. 3, 2008), available at <http://ncseonline.org/NLE/CRSreports/08Jun/RL33934.pdf>.

³⁶ 7 U.S.C. § 8715(a)(1).

³⁷ 7 U.S.C. §§ 8702(11), 8714(e).

rate is the result of subtracting from the statutory target price both the direct payment rate and the higher of the national loan rate for the crop or the national average farm price for the crop for that year.³⁸

The payment limit on DCP counter-cyclical payments is \$65,000 per person per crop year.³⁹

DCP counter-cyclical payments can vary widely from commodity to commodity and from year to year. In the 2003-2004 crop year, counter-cyclical payments were made only for upland cotton, rice, and peanuts; in the 2006-2007 crop year, counter-cyclical payments were made only for upland cotton and peanuts.⁴⁰ Over the whole life of DCP, peanuts have received the highest aggregate per acre counter-cyclical payment, followed by upland cotton, rice, and corn.⁴¹

USDA's Economic Research Service estimates that outlays for DCP counter-cyclical payments will be \$1.23 billion for 2009, compared to \$712 million in 2008, and \$895 million forecasted for 2010.⁴²

2. Marketing Assistance Loans

Harvest time for program commodities tends to be the same for all farmers in a region, with only a little variation even from one region to another. The result is that the market is flooded with product at harvest time and the price for the commodity drops precipitously. If farmers could hold onto the crop after harvest and space out their sales, they could secure a better price for their crop. But farmers typically have input suppliers and other creditors who are expecting to be paid as soon as the crop is harvested. Beginning with the Agricultural Adjustment Act of 1938, Congress has sought to alleviate this pressure on farmers to sell their crops at exactly the time when prices are lowest by authorizing USDA to offer farmers short-term, commodity-secured loans.⁴³ These loans provide farmers with financial liquidity at harvest time while allowing them to delay sale of their crops

³⁸ 7 U.S.C. § 8714(b), (d).

³⁹ 7 U.S.C. § 1308(c)(2).

⁴⁰ ERS Briefing Room, "Farm and Commodity Policy: Program Provisions: Counter-Cyclical Payments," at <http://ers.usda.gov/Briefing/FarmPolicy/CounterCyclicalPay.htm>.

⁴¹ ERS Briefing Room, "Farm and Commodity Policy: Program Provisions: Counter-Cyclical Payments," at <http://ers.usda.gov/Briefing/FarmPolicy/CounterCyclicalPay.htm>.

⁴² Farm Sector Income Forecast, Economic Research Service, USDA, http://www.ers.usda.gov/Briefing/FarmIncome/Data/GP_T6.htm.

⁴³ See, Pub. L. No. 75-430, Title III, § 302.

until a more favorable marketing time.⁴⁴ The loans are taken out based on a set amount per unit of production (the “loan rate”), e.g., \$5.00 per bushel for soybeans.⁴⁵

The 2008 Farm Bill continued the Marketing Assistance Loan program policies of previous Farm Bills, but made some changes to loan rates and the ways farmers can receive the benefits under the program.⁴⁶ Loan rates were increased for wheat and small grains for the 2008 through 2012 crop years; for most other commodities, the loan rates were kept at the same levels as under the 2002 Farm Bill.

Like DCP counter-cyclical payments, benefits from the Marketing Assistance Loan program increase as market prices fall. In stark contrast to DCP, however, the Marketing Assistance Loan program is solely concerned with the farmer’s actual crop production in a given year. Historical acreage and yields are irrelevant, though the farmer must provide acreage and production records for the actual crop year.⁴⁷

Marketing assistance loans are nonrecourse, which means that the farmer can forfeit the commodity to USDA in full payment of the debt if the market price does not improve enough to allow full repayment of the loan and accrued interest.⁴⁸ After decades of USDA using stockpiles of forfeited commodities for foreign aid and domestic nutrition and disaster assistance programs, Congress concluded that the expense of managing the stockpiles was too high and began changing the program to make the alternatives to forfeiture more attractive to farmers.⁴⁹ USDA’s express preference is now not to receive forfeited commodities so to avoid the costs of storage and disposition.⁵⁰

⁴⁴ See, “Report of the Commission on the Application of Payment Limitations for Agriculture,” at 23 (Aug. 2003), available at http://www.usda.gov/oce/reports/payment_limits/paymentLimitsAll.pdf.

⁴⁵ 7 U.S.C. § 8732(c)(10).

⁴⁶ 2008 Farm Bill, Title I, Subtitle B.

⁴⁷ 7 C.F.R. § 718.102(b)(2) (2010).

⁴⁸ “Nonrecourse Marketing Assistance Loans/Loan Deficiency Payments,” USDA Farm Service Agency Fact Sheet (Nov. 2009), available at http://www.fsa.usda.gov/Internet/FSA_File/malldp09.pdf.

⁴⁹ Womach, “Agricultural Marketing Assistance Loans and Loan Deficiency Payments,” Congressional Research Service Report for Congress (Dec. 13, 2000), available at <http://www.cnie.org/NLE/CRSreports/Agriculture/ag-59.cfm>.

⁵⁰ “Nonrecourse Marketing Assistance Loans/Loan Deficiency Payments,” USDA Farm Service Agency Fact Sheet (Nov. 2009), available at http://www.fsa.usda.gov/Internet/FSA_File/malldp09.pdf.

Statutory changes to the Marketing Assistance Loan program culminated with a provision, first enacted in the 1985 Farm Bill, that permits farmers to repay nonrecourse commodity loans at a rate below the established loan rate at any point during the loan period if the market price on the repayment date is below the original loan rate plus accrued interest.⁵¹ In such a case, the farmer may settle a loan by paying the posted county price (wheat, feed grains, and oilseeds), the national posted price (peanuts), or the prevailing world price (rice and upland cotton) for the commodity for each unit of production (e.g., bushel of corn) that was pledged for the loan.⁵² Any accrued interest on the loan is waived.

When the loan repayment rate was fixed, it acted as a price floor for the commodity, because farmers would opt to forfeit their crop collateral in lieu of repayment if the market price was below the loan rate, and forfeiture would remove that quantity of the commodity from the market to keep pricing trending up.⁵³ With the shift in 1985 to loan repayment rates based on whatever the current market price was, the market prices for commodities could (and did) fall below farmers' production costs. The justification for this, like many of the commodity program changes in the 1980s and 1990s, was that lower prices would drive export volumes which would more than compensate for the lower prices. As Ray observed in 1999, "This has failed or at best has cost billions of dollars to increase demand by millions."⁵⁴ The result of the variable loan repayment rate has been to transform what for decades was a short-term, relatively low-cost marketing assistance program into a major farm income support program with commodity buyers reaping the windfall.⁵⁵

⁵¹ See 1985 Farm Bill §§ 308 (wheat), 401 (corn, grain sorghum, barley, oats, and rye), 601 (rice).

⁵² ERS Briefing Room, "Farm and Commodity Policy: Program Provisions: Program Provisions: Marketing Assistance Loans and Loan Deficiency Payments," at <http://ers.usda.gov/Briefing/FarmPolicy/malp.htm>.

⁵³ Womach, "Agricultural Marketing Assistance Loans and Loan Deficiency Payments," Congressional Research Service Report for Congress (Dec. 13, 2000), available at <http://www.cnie.org/NLE/CRSreports/Agriculture/ag-59.cfm>.

⁵⁴ Ray, "Why Grain Markets Don't Self-Correct Under Current Policies," Testimony before the U.S. Senate Committee on Agriculture, Forestry and Nutrition (Aug. 4, 1999), available at <http://agpolicy.org/pubs/grainmkt0899.pdf>.

⁵⁵ Womach, "Agricultural Marketing Assistance Loans and Loan Deficiency Payments," Congressional Research Service Report for Congress (Dec. 13, 2000), available at <http://www.cnie.org/NLE/CRSreports/Agriculture/ag-59.cfm>.

a. Marketing Loan Gains

When commodity prices are low and a farmer repays a marketing assistance loan at less than the established loan rate, the difference between the loan rate and repayment rate is called a marketing loan gain.⁵⁶

Example: A farmer produces 10,000 bushels of corn and pledges all of it as collateral for a marketing assistance loan in October. At a loan rate of \$1.98 per bushel, the farmer will receive \$19,800 in loan proceeds. ($\$1.98 \text{ loan rate} \times 10,000 \text{ bushels} = \$19,800$). If the farmer settles the loan on a day in February when the posted county price for corn is \$1.80 per bushel, the repayment amount will be \$18,000. ($\$1.80 \times 10,000 \text{ bushels} = \$18,000$). The farmer's marketing loan gain would be \$1,800. ($\$19,800 \text{ loan principal} - \$18,000 = \$1,800$).⁵⁷

USDA's Economic Research Service estimates that marketing loan gains will amount to \$135 million for 2009, compared to \$29.7 million in 2008, and \$5 million forecasted for 2010.⁵⁸

b. Loan Deficiency Payments (LDP)

Loan Deficiency Payments (LDPs) were first authorized by the 1985 Farm Bill and allow eligible farmers to receive the cash equivalent of a marketing loan gain when commodity prices are low without having to first take out a marketing assistance loan.⁵⁹ Like the policy of allowing marketing assistance loans to be repaid at a lower rate if prices are low, LDPs are intended to provide farmers with the benefits of the Marketing Assistance Loan program while minimizing the risk that USDA will become responsible for a stockpile of forfeited commodities. The LDP payment rate is the difference between the loan rate for the crop and the loan repayment rate on the day the farmer requests an LDP.⁶⁰

⁵⁶ Womach, "Agricultural Marketing Assistance Loans and Loan Deficiency Payments," Congressional Research Service Report for Congress (Dec. 13, 2000), available at <http://www.cnire.org/NLE/CRSreports/Agriculture/ag-59.cfm>.

⁵⁷ "Report of the Commission on the Application of Payment Limitations for Agriculture," at 24 (Aug. 2003), available at http://www.usda.gov/oce/reports/payment_limits/paymentLimitsAll.pdf.

⁵⁸ Farm Sector Income Forecast, Economic Research Service, USDA, http://www.ers.usda.gov/Briefing/FarmIncome/Data/GP_T6.htm.

⁵⁹ See 1985 Farm Bill §§ 308 (wheat), 401 (corn, grain sorghum, barley, oats, and rye), 601 (rice). In fact, the farmer must agree to forego taking out a marketing assistance loan on the crop in order to be eligible for an LDP.

⁶⁰ 7 U.S.C. § 8735(c).

Example: Rather than offer up his corn crop as security for a marketing assistance loan, as in the example above, the farmer could opt to receive an LDP and either market the 10,000 bushels of corn immediately or hold the crop and wait to see if the market price increases. If the posted county price is \$1.80 per bushel on the day the farmer wishes to receive the LDP (which must be prior to the marketing of the corn), the LDP rate would be \$0.18 per bushel (\$1.98 loan rate - \$1.80 market price = \$0.18). On that day, the farmer would receive an LDP of \$1,800 (\$0.18 payment rate x 10,000 bushels = \$1,800).⁶¹

USDA's Economic Research Service estimates that LDPs will amount to \$150 million for 2009, compared to \$84.8 million in 2008, and \$90 million forecasted for 2010.⁶²

c. Commodity Certificate Exchange

From 1999 to 2009, farmers could also benefit from the Marketing Assistance Loan program by participating in a Commodity Certificate Exchange.⁶³ Under this provision, a farmer who had taken out a marketing assistance loan would, at some time prior to the loan maturity date, relinquish the crop collateral to USDA in full repayment of the loan. At the same time, the farmer would purchase from USDA certificates for the amount of the commodity that was relinquished, with the certificate price being the marketing assistance loan repayment rate for that day. Finally, the farmer would then immediately exchange the certificates for the amount of the commodity that had previously been relinquished.⁶⁴ The end result is that the farmer (again) had complete control of the commodity and had fully settled the marketing assistance loan at the lower repayment rate.

For those unaccustomed to the federal commodity payment programs, it may be hard to fathom why Congress would have established this complicated alternative mechanism for settling a marketing assistance loan when the farmer could simply have repaid the loan at the lower repayment rate, taken the marketing loan gain, and achieved exactly the same end result. The key difference is that under the 1990, 1996, and 2002 Farm Bills there was a limit on the amount of marketing loan gains and LDPs a person could receive in a given crop year, while there was

⁶¹ "Report of the Commission on the Application of Payment Limitations for Agriculture," at 24, (Aug. 2003), available at http://www.usda.gov/oce/reports/payment_limits/paymentLimitsAll.pdf.

⁶² Farm Sector Income Forecast, Economic Research Service, USDA, available at http://www.ers.usda.gov/Briefing/FarmIncome/Data/GP_T6.htm.

⁶³ 7 C.F.R. § 1421.110(d) (2010); 7 C.F.R. § 1421.111 (2003-2009).

⁶⁴ 7 C.F.R. § 1421.110(d) (2010).

no limit on the amount of gain a person could receive through commodity certificate exchanges.⁶⁵ In the 2008 Farm Bill, Congress eliminated this complicated end run around its own payment limitation provisions by simply removing the limit on marketing loan gains and LDPs, and also removing authority for the commodity certificate exchange after the 2009 crop year.⁶⁶

USDA's Economic Research Service estimates that gains from commodity certificate exchanges will amount to \$703 million for 2009, compared to \$202 million in 2008.⁶⁷

3. Average Crop Revenue Election (ACRE) Program

To supplement the commodity programs carried over from previous Farm Bills, the 2008 Farm Bill created a new Average Crop Revenue Election (ACRE) Program to be offered in crop years 2009-2012.⁶⁸ As the name suggests, ACRE is concerned with farm revenue. As a result, it is an alternative to the counter-cyclical payment portion of DCP. Farmers who choose to enroll in ACRE will forfeit their claim to any DCP counter-cyclical payments through the 2012 crop year.⁶⁹ During this period they will also receive lower DCP direct payments (80 percent of the established rate) and will be eligible for lower marketing assistance loan rates (70 percent of the established rate).⁷⁰

Like DCP, ACRE eligibility is tied to a farm's historical production of specified commodity crops, i.e., "base acreage".⁷¹ Unlike DCP, a farmer's payment under ACRE is based at least in part on the farmer's production decisions and yield results for a particular year. Because ACRE is a whole-farm revenue support program, a farmer must enroll all covered commodities for a participating farm.

For an ACRE payment to be triggered, the actual revenue must be less than the ACRE revenue guarantee for both the state and the particular farm. That is, the state revenue (actual state yield for the crop \times national market price) must be less than the state guarantee (90 percent of the five-year average state yield \times two-year average national market price), and the farm revenue (actual farm yield \times national market price) must be less than the farm guarantee (five-year average yield \times two-

⁶⁵ 1990 Farm Bill § 1111; 1996 Farm Bill § 115; 2002 Farm Bill § 1603.

⁶⁶ 2008 Farm Bill §§ 1603(b), 1607.

⁶⁷ Farm Sector Income Forecast, Economic Research Service, USDA, available at http://www.ers.usda.gov/Briefing/FarmIncome/Data/GP_T6.htm.

⁶⁸ 2008 Farm Bill § 1105.

⁶⁹ 7 U.S.C. § 8715(a).

⁷⁰ 7 U.S.C. § 8715(a).

⁷¹ 7 U.S.C. § 8715(a)(2)(A).

year average national market price, plus the farmer's per acre crop insurance premium).⁷²

If a payment is triggered, ACRE will pay out on a portion of the farmer's planted acreage (83.3 percent or 85 percent, depending on the crop year) based on the state-level revenue shortfall and the farmer's relative productivity.⁷³

The payment limit on ACRE payments is \$65,000 per person per crop year, plus the amount that the farmer's DCP payments are reduced (20 percent).⁷⁴

USDA's Economic Research Service forecasts that ACRE payments will amount to \$403 million for 2010, the first year that payments will be distributed under this new program.⁷⁵

C. Crops Eligible for Commodity Program Payments

The commodity programs discussed above have their roots in the Agricultural Adjustment Act of 1938's programs for wheat, cotton, corn, rice, and tobacco. Various crops have been added to and removed from the list of covered commodities over the past several decades. Which crops are included has been to some degree a matter of tradition and political influence by particular commodity groups or regional interests. Another key factor is more prosaic: these are commodities that are non-perishable and largely fungible and therefore can be easily commingled and stored for long periods with little reduction in quality or value. As a result, these are the crops that are particularly vulnerable to widespread market manipulation.⁷⁶

Coverage under the current programs is as follows:

- DCP direct payments: Wheat, corn, barley, oats, sorghum, rice, soybeans, other oilseeds, peanuts, and upland cotton.⁷⁷

⁷² 7 U.S.C. § 8715(b)(2).

⁷³ 7 U.S.C. § 8715(g).

⁷⁴ 2008 Farm Bill § 1603(b)(3).

⁷⁵ Farm Sector Income Forecast, Economic Research Service, USDA, available at http://www.ers.usda.gov/Briefing/FarmIncome/Data/GP_T6.htm.

⁷⁶ See, e.g., *Board of Trade of the City of Chicago v. Olsen*, 262 U.S. 1, 12-17 (1923); Santos, "A History of Futures Trading in the United States" (EH.Net Encyclopedia, Mar. 16, 2008), available at <http://eh.net/encyclopedia/article/santos.futures>.

⁷⁷ 2008 Farm Bill §§ 1001(4), (14), 1103(a), 1303. Although peanuts are not defined in the statute as a "covered commodity," all of the same provisions apply to peanuts, and so they are considered to be included in references to covered commodities. Handbook 1-DCP (Rev. 3), "Direct and Counter-Cyclical Program and Average Crop Revenue

- DCP counter-cyclical payments: All of the DCP direct payment crops plus dry peas, lentils, and garbanzo beans.⁷⁸
- Marketing Assistance Loans and LDPs: Wheat, corn, barley, oats, sorghum, rice, soybeans, other oilseeds, peanuts, dry peas, lentils, garbanzo beans, honey, wool and mohair, and cotton.⁷⁹
- ACRE: Wheat, corn, barley, oats, sorghum, rice, soybeans, other oilseeds, peanuts, dry peas, lentils, garbanzo beans, and upland cotton.⁸⁰

There are also federal payment programs for milk, sugar beets, and sugar cane, but the program provisions are quite different from those discussed in this chapter.⁸¹

As can be seen in this map from USDA's Economic Research Service, commodity payments tend to be concentrated in certain regions of the country that are major production areas for the eligible commodities: Midwest (corn and soybeans), Southeast (cotton and peanuts), California (cotton and rice), Arizona (cotton), and the lower Mississippi River (cotton and rice).⁸²

Election for 2009 and Subsequent Crop Years,” available at http://www.fsa.usda.gov/Internet/FSA_File/1-dcp_r03_a07.pdf.

⁷⁸ 2008 Farm Bill §§ 1001(4), (14), 1104(a), 1304.

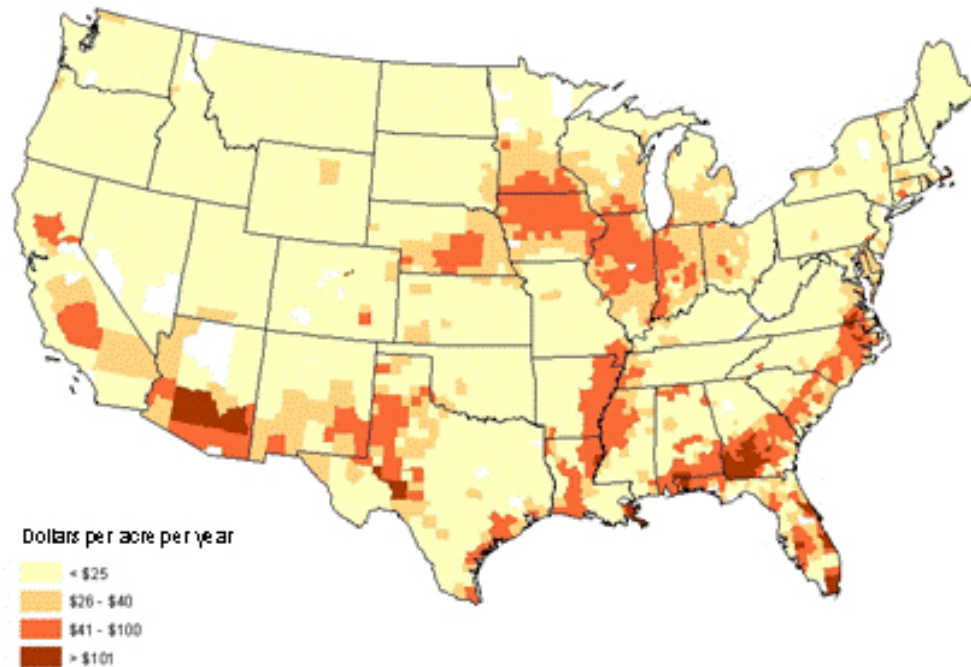
⁷⁹ 2008 Farm Bill §§ 1001(8), 1202, 1307.

⁸⁰ 2008 Farm Bill §§ 1001(4), (14), 1105.

⁸¹ 2008 Farm Bill, Title I, Subtitle D (milk); 2008 Farm Bill, Title I, Subtitle A (sugar). For an analysis of support for sugar production under a previous Farm Bill, see General Accounting Office, “Sugar Program: Supporting Sugar Prices Has Increased Users’ Costs While Benefiting Producers,” GAO/RCED-00-126 (June 2000), available at <http://www.gao.gov/archive/2000/rc00126.pdf>.

⁸² ERS Briefing Room, “Farm and Commodity Policy: Government Payments and the Farm Sector,” available at <http://www.ers.usda.gov/Briefing/FarmPolicy/gov-pay.htm>.

Average commodity payments per cropland acre, 2004-07



Source: Compiled by USDA, Economic Research Service from USDA, Farm Service Agency data.

III. HOW COMMODITY PROGRAM POLICIES AFFECT FRUIT AND VEGETABLE PRODUCTION

A. Fruit and Vegetable Planting Restrictions on Base Acreage for Commodity Programs

As the focus of the major commodity programs shifted from supply management to income support, Congress began to view “planting flexibility” as a desirable policy goal. Planting flexibility means that a farmer can plant whatever crop he or she chooses on “base” (i.e., program qualifying) acreage without adversely affecting program payment eligibility. In the 1990 Farm Bill, planting flexibility was introduced to the major commodity programs with a provision allowing farmers to treat up to 25 percent of their base acreage as “flex acres” on which non-program crops could be grown without penalty.⁸³ The 1996 Farm Bill extended this flexibility to all base acreage on a farm and also removed

⁸³ 1990 Farm Bill § 1101.

restrictions on using base acreage livestock grazing, haying, or production of forage crops.⁸⁴ The 2002 and 2008 Farm Bills continued this policy.⁸⁵

A key exception to this “planting flexibility” policy has been a continuous restriction against planting fruits and vegetables on base acreage. Several fruit and vegetable producer organizations lobbied to have these restrictions included when they saw commodity program policy changing from supply management to “decoupled” payments. Their concern was the competitive disadvantage they believed current fruit and vegetable farmers would face if farmers receiving full “decoupled” commodity program payments entered the market to compete in a sub-industry that receives neither supply management nor income support intervention from USDA.⁸⁶

1. General Restriction

There is a general prohibition against planting perennial fruits, vegetables, or wild rice, or harvesting non-perennial fruits, vegetables, or wild rice on land used as base acreage for DCP and ACRE in a year when the farm is enrolled in the program.⁸⁷ Note that the prohibition requires harvesting to occur. If a fruit, vegetable, or wild rice crop is planted but not harvested, no violation has occurred.

The penalty for violating this restriction varies with USDA’s perception of the seriousness of the violation, but it can be quite severe. At a minimum, the farmer’s program payments for the year will be reduced by the amount of DCP direct payments, DCP counter-cyclical payments, and ACRE payments attributable to the acres in violation *and* the market value of the fruits, vegetables,

⁸⁴ 1996 Farm Bill § 118.

⁸⁵ 2002 Farm Bill § 1106; 2008 Farm Bill § 1107.

⁸⁶ See, Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?” at 7, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>; Patterson and Richards, “Farm Bill Flex Acre Provisions and Fruit, Vegetable, and Nut Production,” at 3, Arizona State University (July 2006), available at <http://cissc.calpoly.edu/farmbill/farmbillflexacreprovisionsandfruit2.pdf>; Thornsby, et al., “Michigan: A State at the Intersection of the Debate Over Full Planting Flexibility,” at 36, Michigan State University Department of Agricultural Economics (Feb. 2007), available at <http://hdl.handle.net/10113/33691>; “An Analysis of the Effect of Removing the Planting Restrictions on Program Crop Base,” at v, 17-19, 41-42, Informa Economics (Feb. 2007), available at <http://www.competitiveagriculture.org/images/FinalReport2007.pdf>.

⁸⁷ 7 U.S.C. § 8717. Mung beans and pulse crops, including dry peas, lentils, and chickpeas, are specifically excluded from these categories.

or wild rice grown on the base acreage, as determined by the Farm Service Agency (FSA) State Committee.⁸⁸ If FSA determines that the violation is serious, the farmer's DCP/ACRE contract will be terminated and the farmer will have to repay, with interest, any DCP/ACRE payments already received under that year's contract.⁸⁹

Under the 1996 Farm Bill, the penalty for violation of the fruit and vegetable planting restriction was even more severe. Rather than using annual contracts as are used for DCP under the 2002 and 2008 Farm Bills, the 1996 Farm Bill program used a single seven-year contract for the whole term of that Farm Bill.⁹⁰ So termination of that contract for a fruit and vegetable planting violation meant that the farmer could receive no further payments for the term of the 1996 Farm Bill and might have to repay several years' payments already received.⁹¹

2. Exceptions

a. Double-cropping

No violation occurs if the farm is located in a county approved by USDA for double-cropping (growing more than one crop on the same ground in a single year), and the fruit, vegetable, or wild rice crop is double-cropped with an eligible commodity.⁹² In such cases, there is no reduction in DCP/ACRE payments and no limit on the amount of base acreage that may be double-cropped.

b. Farm History

If there is a history of planting the fruit, vegetables, or wild rice on the particular farm acreage between 1991-1995 or 1998-2001, the restriction is lifted but there will be a per-acre reduction in eligibility for DCP/ACRE payments.⁹³ There is no limit on the number of base acres that may be planted to fruits, vegetables, and wild rice under this exception.

c. Farmer History

If the farmer has a history of planting a specific fruit, vegetable, or wild rice crop on any acreage, the farmer may plant and harvest that specific crop so long as the

⁸⁸ 7 C.F.R. § 1412.61(b) (2010).

⁸⁹ 7 C.F.R. § 1412.61(a) (2010).

⁹⁰ 1996 Farm Bill § 112(b).

⁹¹ 1996 Farm Bill § 116.

⁹² 7 U.S.C. § 8717(c)(1).

⁹³ 7 U.S.C. § 8717(c)(2).

farmer meets acreage limits (no more than the farmer's average acreage planted to the specific crop between 1991-1995 or 1998-2001, as designated by the farmer).⁹⁴ The farmer's eligibility for DCP/ACRE payments will be reduced on a per-acre basis.

d. Opt Out

A farmer may forego enrolling in DCP/ACRE for a particular crop year and grow fruits, vegetables, or wild rice without limit, with no penalty in a subsequent enrollment year, either in payment level or acreage.⁹⁵ But no payment would be received for the opt-out year. The opt-out choice, and loss of DCP/ACRE eligibility for the year, apply to all of the farmer's base acreage regardless of how much is actually used to produce fruits, vegetables, and/or wild rice.

e. Marketing Assistance Loans

Because planting flexibility and the fruit and vegetable restriction are tied to base acreage for commodity programs, the restriction does not apply to the Marketing Assistance Loan program, which does not require base acreage.

3. Planting Transferability Pilot Project in 2008 Farm Bill

The 2002 Farm Bill added soybeans as a program commodity eligible for establishing base acreage for DCP/ACRE payments. As a result, soybeans became the preferred crop to rotate with corn in the Great Lakes/Midwest, a region where vegetables grown for processing had been a fairly common rotation crop.⁹⁶ Some freezing and canning processors reported difficulty obtaining sufficient supplies and farmers, and bills were introduced in both the Senate and the House of Representatives in the 108th, 109th, and 110th Congresses to permit the use of base acreage to grow fruits and vegetables for canning and freezing with no

⁹⁴ 7 U.S.C. § 8717(c)(3).

⁹⁵ "Direct and Counter-Cyclical Payment Program Fruit, Vegetable, and Wild Rice Provisions" USDA Farm Service Agency Fact Sheet (Mar. 2009); Handbook 1-DCP (Rev. 3), "Direct and Counter-Cyclical Program and Average Crop Revenue Election for 2009 and Subsequent Crop Years," page 8-2, para. 469-C (Apr. 20, 2009), available at http://www.fsa.usda.gov/Internet/FSA_File/1-dcp_r03_a07.pdf.

⁹⁶ Johnson et al., "Eliminating the Planting Restrictions on Fruits and Vegetables in the Farm Commodity Programs," at CRS-2, Congressional Research Service Report for Congress (May 25, 2007), available at <http://ncseonline.org/NLE/CRSreports/07Jun/RL34019.pdf>.

penalty other than an acre-for-acre reduction in the annual DCP/ACRE payments.⁹⁷

In lieu of enacting any kind of general exemption for vegetables grown for processing, Congress in the 2008 Farm Bill established a pilot program for 2009-2012 to assess its impact on both the processed and fresh fruit and vegetable markets.⁹⁸

Only a specified number of base acres in each of seven states may be enrolled in the pilot program: 9,000 acres each in Illinois, Indiana, Michigan, and Wisconsin; 1,000 acres in Iowa; 4,000 acres in Ohio; and 34,000 acres in Minnesota.⁹⁹ Base acres (and therefore DCP/ACRE payments) will be reduced on an acre-for-acre basis for the year(s) in which the farm is in the pilot project.¹⁰⁰ Only specified crops are permitted—cucumbers, green peas, lima beans, pumpkins, sweet corn, snap beans, and tomatoes—and the crop must be grown under a processing contract.¹⁰¹

A farmer participating in the project must agree to grow the crop as part of a crop rotation that will “achieve agronomic and pest and disease management benefits.”¹⁰² The farmer must report acreage and production of the crop to the Farm Service Agency (FSA) and must file a notice of loss if the crop is prevented from being planted or is affected by a disaster after planting.¹⁰³

FSA must periodically report to Congress to evaluate the supply of fresh and processed fruits and vegetables and whether producers of fresh fruits and vegetables are being adversely affected by the project or existing production capacities are being supplanted.¹⁰⁴

⁹⁷ Johnson, et al., “Eliminating the Planting Restrictions on Fruits and Vegetables in the Farm Commodity Programs,” at CRS-2, Congressional Research Service Report for Congress (May 25, 2007), available at <http://ncseonline.org/NLE/CRSreports/07Jun/RL34019.pdf>.

⁹⁸ 2008 Farm Bill § 1107(d).

⁹⁹ 2008 Farm Bill § 1107(d)(2).

¹⁰⁰ 2008 Farm Bill § 1107(d)(4).

¹⁰¹ 2008 Farm Bill § 1107(d)(1), (3)(A).

¹⁰² 2008 Farm Bill § 1107(d)(3)(B).

¹⁰³ 2008 Farm Bill § 1107(d)(3)(C).

¹⁰⁴ 2008 Farm Bill § 1107(d)(7).

B. Pressure on Land Value and Availability

Apart from the explicit prohibition on growing and harvesting fruits, vegetables, and wild rice on program base acreage, there are concerns that the commodity payment programs are an obstacle to increased fruit and vegetable production because they inflate farmland rental rates and sale prices, discouraging landowners from renting to farmers raising non-program crops, discouraging creditors from financing farmers raising non-program crops, and generally making it more difficult for those farmers to get access to land.

1. Decoupled Payments Are Likely Absorbed Directly into Rental Rates and Land Sale Values

There is a widespread perception that under the current decoupled commodity programs, where payments are based solely on historical production on particular acreage, landlords have captured almost the entire payment on rented land.¹⁰⁵ For the landlord, the baseline expectation will be keeping the entire payment and letting the land lie fallow, so any active rental of base acreage will be expected to generate a higher return than the program payment. Before the 2002 Farm Bill was enacted, USDA's Economic Research Service published an article observing that "landowners may be able to capture relatively larger proportions" of commodity program payments that are "tied to ownership of cropland with a history of enrollment in commodity programs."¹⁰⁶

The same article concluded that the commodity program payments implemented under the 1996 Farm Bill "added nearly \$64 billion to U.S. farmland values . . . unrelated to inherent agricultural productivity, yet add[ing] to the fixed cost of agricultural production for some producers."¹⁰⁷

2. Landowners' Desire to Capture and Protect Base Acreage Status Discourages Rental for Non-Program Crops

As discussed above, payments for the major commodity support program—the Direct and Counter-Cyclical Payment Program—are based on historical

¹⁰⁵ See, Marlow, "The Non-Wonk Guide to Understanding Federal Commodity Payments," at 17, RAFI-USA (2005), available at <http://www.rafiusa.org/pubs/nonwonkguide>.

¹⁰⁶ Barnard, et al., "Higher Cropland Value from Farm Program Payments: Who Gains?" at 27, ERS Agricultural Outlook (Nov. 2001), available at <http://www.ers.usda.gov/publications/agoutlook/nov2001/ao286h.pdf>.

¹⁰⁷ Barnard, et al., "Higher Cropland Value from Farm Program Payments: Who Gains?" at 30, ERS Agricultural Outlook (Nov. 2001), available at <http://www.ers.usda.gov/publications/agoutlook/nov2001/ao286h.pdf>.

production of eligible commodity crops on particular acreage. When program-eligible acreage is rented out, the distribution of DCP payments between the farmer-tenant and the landowner will depend on terms of the lease, with the landlord entitled to receive a direct share only if he or she has an interest in the crop.¹⁰⁸ However, even when landowners receive no DCP payment in a particular year, they have a keen interest in what payments their land is eligible for. The 2002 Farm Bill and, to a lesser extent the 2008 Farm Bill, added additional eligible crops (primarily soybeans) and permitted program-eligible base acres to be adjusted to take into account additional acres planted to eligible commodity crops. The changes were significant nationwide—base acreage increased from 211 million acres to 269 million acres—and positively dramatic in some regions—the portion of Indiana cropland designated as base acreage increased from 57 percent to 93 percent.¹⁰⁹ Having observed this expansion of eligibility in the 2002 Farm Bill, many landowners have become protective of the planting activities on their land. They are unwilling to risk losing eligibility under future Farm Bill changes and hope to secure eligibility for more acreage in the future by accumulating more commodity history.¹¹⁰ The result is that DCP planting restrictions can affect farmers' ability to rent even non-base acreage to grow fruits and vegetables. There is less rental land available to these farmers, and what land is available will be leased at a higher cost.

C. Effect on Access to Credit

As is discussed further in Chapter 4, the availability of program payments for land enrolled in commodity programs, and the absence of such payments, in general, for land used to produce fruits and vegetables, create a disincentive for lenders considering loan applications from farmers who seek to produce fruits and vegetables. This affects farmers' ability to secure financing for land purchases as well as general farm operating credit. Anticipated program payments provide additional security for loans to farmers who produce covered commodities.

IV. RECOMMENDATIONS FOR POLICY CHANGES RELATED TO FARM COMMODITY PROGRAMS

There is no question that the Direct and Counter-Cyclical Payment Program, together with the Average Crop Revenue Election Program, create an explicit

¹⁰⁸ 7 C.F.R. § 1400.207 (2010).

¹⁰⁹ Johnson, et al., "Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?" at 2, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

¹¹⁰ "Farm Bill Forum Comment Summary: Production Controls," USDA (Mar. 2006), available at http://www.usda.gov/documents/Production_Controls.pdf.

barrier to fruit and vegetable production on base acreage enrolled in those programs. There are also indications that the commodity payment programs drive up land costs across the board and, as a result, the fruit and vegetable planting restrictions may make some landowners disinclined to rent, and creditors disinclined to lend, to farmers who will grow fruits or vegetables.

What is unknown is the magnitude of the effect of these constraints on overall fruit and vegetable production. In 2006, in anticipation of the then-upcoming 2008 Farm Bill, USDA's Economic Research Service (ERS) produced a report on the anticipated market effects of eliminating the fruit and vegetable planting restrictions.¹¹¹ Based on an analysis of national crop production, land use, and price data, and on meetings with farmers, vegetable processors, and researchers in Michigan,¹¹² ERS concluded that relaxing the planting restrictions was not likely to result in significant shifting of production from commodities to fruits and vegetables on a national scale.¹¹³

ERS did predict increased production of a few crops in a few areas—e.g., sweet corn in California, dry beans in the Upper Midwest, and tomatoes in the southeastern coastal plain¹¹⁴—but found that barriers other than commodity program rules appear to play a more significant role in dissuading farmers from switching to fruit and vegetable production. These other barriers to conversion to fruit and vegetable production include: the need for specialized equipment and expertise, harvesting labor, higher production costs, more complicated production practices, greater risk, agronomic constraints (limited season, water, etc.), need to negotiate a processing or marketing contract, and uncertain proximity to a processing plant or market for fresh produce.¹¹⁵ ERS found that the increased returns from a successful transition to fruit or vegetable production were high

¹¹¹ Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?” Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

¹¹² Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?,” at 7, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

¹¹³ Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?,” at 36, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

¹¹⁴ Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?,” at 36-37, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

¹¹⁵ Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?,” at 15, 37, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

enough that, if a farmer were comfortable making the transition in the face of these other barriers, the loss of the relatively small per-acre payment from the commodity programs would not be a sufficient reason to hold back.¹¹⁶ The problem is that the current law does not allow for reductions on a per-acre basis for only those acres planted to fruits or vegetables. Instead a farmer must take all acres out of the program, whether or not they are all planted to fruits and vegetables, thus forcing the farmer to incur much larger penalties than those considered by ERS.

ERS concluded that the most significant impact of removing the planting restrictions would be on individual farmers as production would shift from some current fruit and vegetable farmers who would no longer be viable producers to other farmers transitioning from commodity production.¹¹⁷ Noting that a similar reshuffle occurred in 2002 following the discontinuation of the peanut quota program, ERS predicted that the markets would adjust to the policy change within a year or two.¹¹⁸

Similar studies conducted by Arizona State University, Michigan State University, Texas A&M University, and Informa Economics (an economic consulting firm acting on behalf of several state and national fruit and vegetable associations) were reported in 2006 and 2007.¹¹⁹ The Arizona State and Informa studies were national in scope, while the Texas A&M and Michigan State studies had a regional focus. Only the ERS and Michigan State studies considered the

¹¹⁶ Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?,” at 34, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

¹¹⁷ Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?,” at 38, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

¹¹⁸ Johnson, et al., “Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?” at 37-38, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

¹¹⁹ Patterson and Richards, “Farm Bill Flex Acre Provisions and Fruit, Vegetable, and Nut Production,” Arizona State University (July 2006), available at <http://cissc.calpoly.edu/farmbill/farmbillflexacreprovisionsandfruit2.pdf>; Thornsby, et al., “Michigan: A State at the Intersection of the Debate Over Full Planting Flexibility,” Michigan State University Department of Agricultural Economics (Feb. 2007), available at <http://hdl.handle.net/10113/33691>; Fumasi, et al., “Lifting the Fruit and Vegetable Cropping Restriction: Potential Impacts on Cropping Preference in the Lower Rio Grande Valley, Texas,” Agricultural and Food Policy Center, Texas A&M University (Feb. 2006), available at <http://purl.umn.edu/35373>; “An Analysis of the Effect of Removing the Planting Restrictions on Program Crop Base,” Informa Economics (Feb. 2007), available at <http://www.competitiveagriculture.org/images/FinalReport2007.pdf>.

other barriers to entry that commodity farmers considering production of fruit and vegetable crops would face, with the Michigan State study agreeing with ERS's conclusion that, because of these other barriers, in Michigan only dry bean production would likely increase significantly as a result of removing the planting restrictions.¹²⁰

A Congressional Research Service review of the five studies observed that the differences in research approach, scope, and underlying assumptions make it difficult to draw general conclusions about the possible economic effects of eliminating the planting restriction.¹²¹ In particular, CRS noted that none of the studies addressed market demand and trends that could limit marketability of new crop production.¹²² ERS repeatedly acknowledged that its data modeling was limited by a lack of comprehensive data for fruit and vegetable markets.¹²³ The other studies similarly noted the incompleteness of the data analyzed and/or the limited scope of their conclusions regarding the larger question of what the effect

¹²⁰ Thornsby, et al., "Michigan: A State at the Intersection of the Debate Over Full Planting Flexibility," at 37, Michigan State University Department of Agricultural Economics (Feb. 2007), available at <http://hdl.handle.net/10113/33691>.

¹²¹ Johnson, et al., "Eliminating the Planting Restrictions for Fruits and Vegetables in Farm Commodity Programs," at CRS-6, Congressional Research Service Report for Congress (May 25, 2007), available at <http://ncseonline.org/NLE/CRSreports/07Jun/RL34019.pdf>.

¹²² Johnson, et al., "Eliminating the Planting Restrictions for Fruits and Vegetables in Farm Commodity Programs," at CRS-8, Congressional Research Service Report for Congress (May 25, 2007), available at <http://ncseonline.org/NLE/CRSreports/07Jun/RL34019.pdf>.

¹²³ Johnson, et al., "Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?" at 36, Economic Research Report No. 30, ERS, USDA (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

of a removal of the planting restrictions would be.¹²⁴ As the Arizona State study concluded, “more market information would be highly desirable.”¹²⁵

In addition to these economists, sustainable agriculture and food policy advocates have expressed doubt that the commodity programs, and their planting restrictions, are the most important issue for a fruit and vegetable production policy or a healthy farm policy in general.¹²⁶ Among fruit and vegetable farmers themselves, there is disagreement about the extent to which the fruit and vegetable planting restrictions in the commodity payment programs represent sound policy.¹²⁷ Certainly many farmers who are participating in the commodity payment programs have expressed a desire to be free to grow fruits and/or vegetables on at least a portion of their land.

Recommendations for policy advocacy related to commodity programs include:

- **Develop Farm Bill options for eliminating fruit and vegetable planting restrictions through strategy discussions with the various segments of the fruit and vegetable production sector.** Adequate production of fruits and vegetables to meet the nutritional needs of children will likely require lifting of the commodity program planting restrictions to permit fruits and vegetables to be grown on some acreage that historically has been enrolled in

¹²⁴ Patterson and Richards, “Farm Bill Flex Acre Provisions and Fruit, Vegetable, and Nut Production,” at 12, Arizona State University (July 2006), available at <http://cissc.calpoly.edu/farmbill/farmbillflexacreprovisionsandfruit2.pdf>; Thornsby, et al., “Michigan: A State at the Intersection of the Debate Over Full Planting Flexibility,” at 37-38, Michigan State University Department of Agricultural Economics (Feb. 2007), available at <http://hdl.handle.net/10113/33691>; Fumasi, et al., “Lifting the Fruit and Vegetable Cropping Restriction: Potential Impacts on Cropping Preference in the Lower Rio Grande Valley, Texas,” at 13, Agricultural and Food Policy Center, Texas A&M University (Feb. 2006), available at <http://purl.umn.edu/35373>.

¹²⁵ Patterson and Richards, “Farm Bill Flex Acre Provisions and Fruit, Vegetable, and Nut Production,” at 12, Arizona State University (July 2006), available at <http://cissc.calpoly.edu/farmbill/farmbillflexacreprovisionsandfruit2.pdf>.

¹²⁶ See, e.g., Schaffer, et al., “U.S. Agricultural Commodity Policy and Its Relationship to Obesity,” at 19, Agricultural Policy Analysis Center, University of Tennessee (Mar. 2007); Muller, et al., “Considering the Contribution of U.S. Food and Agricultural Policy to the Obesity Epidemic: Overview and Opportunities,” at 11-12, 31, IATP (Feb. 2007), available at <http://www.agobservatory.org/library.cfm?RefID=99608>.

¹²⁷ See, e.g., Hedin, “My Forbidden Fruits (and Vegetables),” New York Times (Mar. 1, 2008), available at http://www.nytimes.com/2008/03/01/opinion/01hedin.html?_r=1. Compare, Brim, Statement before the U.S. Senate Committee on Agriculture, Forestry and Nutrition (April 24, 2007), available at <http://agriculture.senate.gov/Hearings/hearings.cfm?hearingid=2723&witnessId=6359>.

the commodity programs. Appropriate changes to the planting restriction must begin to be implemented under the next Farm Bill if such changes are to be effective over the next decade in helping to prevent childhood obesity. Strategy discussions in anticipation of the next Farm Bill should identify the specific concerns of various segments of the fruit and vegetable production sector related to the planting restrictions, and should develop various options for changes to the planting restrictions that will address these concerns, with the goal of maximizing production of fruits and vegetables for distribution to markets that best serve vulnerable children. For example, are there targeted changes, similar to the 2008 Farm Bill's pilot project for processing vegetables in the Midwest, that would yield increased production in specific production markets or sectors where an unmet need has been identified?

Are there other focused adjustments that could be implemented on a small scale and/or in particular markets: e.g., an exception to the planting restrictions for fruits and vegetables: (1) that will be sold directly to consumers through avenues such as farmers' markets, roadside stands, you-pick operations, Internet, house-to-house, or on-farm sales; (2) that will be sold locally to schools, grocery stores, and/or restaurants; (3) that are grown by beginning farmers; or (4) that are grown by farmers transitioning to small- or medium-scale organic production? Are there ways to phase-in the elimination of the planting restrictions to attempt to ensure that demand keeps pace with increases in supplies so as to prevent any precipitant declines in prices that might threaten the viability of the farmers' fruit and vegetable operations? Are there specific exceptions to the planting restrictions that may be effectively applied nationally, while others may be more appropriate on a regional or localized basis?

- Prior to Congressional debate on the next Farm Bill, conduct more data collection and analysis to determine effects of various changes to the fruit and vegetable planting restrictions.** To provide support for the various changes to the fruit and vegetable planting restrictions that should be made part of the next Farm Bill, there is need for more economic analysis to assist in projecting the effects various possible changes would have on the production of fruits and vegetables. Studies that have attempted to identify and quantify the effect of removing the fruit and vegetable planting restrictions have noted the need for more complete data. Analysis of different change scenarios is also needed. For example, what would be the difference in impact, if any, of permitting acre-for-acre payment reductions on all commodity program base acres planted to fruits and vegetables, rather than removing the restrictions but still making commodity program payments? What would be the impact if the planting restrictions were lifted to allow small-scale production of fruits and vegetables that will be sold directly to consumers through such avenues as farmers' markets, you-pick operations,

roadside stands, Internet, or house-to-house sales; or locally to schools, grocery stores, and restaurants? How could supply and demand conditions of particular markets be assessed to determine whether any lifting of planting restrictions should be expanded or suspended to allow for stabilization of supply and demand for fruits and vegetables in the area? However, there should be no delay in incorporating appropriate changes to the planting restrictions in the next Farm Bill, even if further economic analysis is still forthcoming. If the ideal analysis is not complete by the time of the Farm Bill debate, proceeding with incomplete knowledge may be the best way to assess how changing the planting restrictions will affect the provision of fruits and vegetables to vulnerable children. In such a case, providing a mechanism for mid-course corrections would be the best way to deal with any unexpected adverse effects of the changes.

- **Strategize with fruit and vegetable farmers about market growth opportunities in relation to opportunities for compromise on planting restrictions.** Strategy discussions among public health, consumer, and farm advocates to identify ways to increase demand for fruits and vegetables to keep pace with any increasing supplies will be crucial to the development and maintenance of strong, long-term production and marketing chains for these essential food crops. Converting even a small percentage of commodity base acres to fruit and vegetable production without increasing demand could threaten markets in the short term. According to the 2007 Census of Agriculture, about 7.7 million acres of land in the U.S. were planted to fruits and vegetables.¹²⁸ In 2009, about 255 million acres were enrolled in DCP and ACRE, the principal farm commodity programs.¹²⁹ Thus, a conversion of just 1 percent of commodity program base acres (roughly 2.5 million acres) would increase the number of acres planted to fruits and vegetables by nearly one-third. If this additional production were released on the market with no other changes, it seems likely that wholesale fruit and vegetable prices would drop substantially. Lower prices might seem desirable from a public health perspective in the short term, but in the long term it would likely result in some fruit and vegetable farmers ceasing production, and thus supply might well contract to previous levels. Some recommendations for increasing demand through the Farm-to-School and other federal nutrition programs are incorporated in Chapter 8.

¹²⁸ 2007 Census of Agriculture: Specialty Crops, Table 1 (2009) (reporting just over 2 million acres of noncitrus fruits, about 1 million acres of citrus fruits, about 260,000 acres of berries, and about 4.4 million acres of vegetables, potatoes, and melons), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Specialty_Crops/speccrop.pdf.

¹²⁹ “USDA Enrolls 255 Million Base Acres in DCP & ACRE on 1.7 Million Farms,” USDA Press Release No. 0519.09 (Oct. 20, 2009).

Chapter 3

Crop Insurance and Disaster Assistance Programs

I. INTRODUCTION

It may seem too obvious to mention, but farmers are highly dependent upon, and vulnerable to, the vagaries of weather. This obvious fact has enormous policy implications. In the first instance, losses suffered as a result of natural disaster may be viewed as matters of individual tragedy. The individual tragedies are significant. Yet if one looks more closely, broader themes emerge.¹

Many reviews of the Farm Bill, and of agricultural policy generally, seem to begin and end with the commodity title. Crop insurance and disaster assistance are under-appreciated as drivers of agricultural policy and of decisions at the farm level. This analysis attempts to fill in this gap in the literature.

According to a 2009 USDA fact sheet, “Agricultural-related disasters are quite common. One-half to two-thirds of the counties in the United States have been designated as disaster areas in each of the past several years.”² A study by the U.S. Global Change Research Program, which coordinates the climate change research activities of federal government agencies, concluded that, “Climate changes—temperature increases, increasing [carbon dioxide] levels, and altered patterns of precipitation—are very likely already affecting U.S. water resources, agriculture, land resources, and biodiversity.”³

¹ One concise summary is Marlow, “Lessons from Katrina,” RAFI-USA (2008), available at <http://www.rafiusa.org/docs/lessonsfromkatrina.pdf>. The first two lessons are “Different types of farms have access to different levels of assistance,” and “Disaster program participation reinforces pre-existing disparities in service.” Lesson Number 4 states that “Many of the most innovative farmers receive the least help.” This is a critical lesson and challenge for those seeking to build food systems that will enhance public health—i.e., those seeking to encourage innovation by farmers.

² “Emergency Disaster Designation and Declaration Process,” Farm Service Agency Fact Sheet (July 2009), available at www.fsa.usda.gov/Internet/FSA_File/disaster09.pdf.

³ Hauser et al., “The Effects of Climate Change on U.S. Ecosystems,” at 22 (Nov. 2009), available at <http://www.usda.gov/img/content/EffectsofClimateChangeonUSEcosystem.pdf> (emphasis in original omitted.) The report states that the marketable yield of many horticultural crops such as tomatoes, onions, and fruits is very likely to be more sensitive to climate change than grain and oilseed crops. *Id.* at 7.

II. BRIEF PROGRAM OVERVIEWS

Farmers' Legal Action Group has published six editions of its *Farmers' Guide to Disaster Assistance*, a comprehensive guide to the federal disaster assistance programs for farmers.⁴ This chapter will discuss key disaster program provisions in context and refers readers to the *Farmers' Guide to Disaster Assistance* for more detailed information.

A. Federal Crop Insurance

In general, federal crop insurance is obtained from private insurance companies, which have been approved by the Federal Crop Insurance Corporation (FCIC).⁵ FCIC is overseen by the Risk Management Agency (RMA), an agency within USDA.⁶ The producer's rights and responsibilities are based primarily on his or her contract with the insurance provider. Although a private provider usually sells federal crop insurance to the producer, the insurance policy itself must be approved by FCIC. FCIC also publishes regulations that govern the terms of policies that producers sign. FCIC reinsures the federal crop insurance coverage sold by private providers and subsidizes producers' premium costs.⁷

B. The Non-insured Crop Disaster Assistance Program (NAP)

USDA's Noninsured Crop Disaster Assistance Program (NAP) was created to provide crop loss assistance to farmers who are unable to obtain federal crop insurance for a particular crop.⁸ In general, farmers may obtain crop insurance

⁴ Krub, et al., FARMERS' GUIDE TO DISASTER ASSISTANCE (FLAG 2008), available at <http://www.flaginc.org/topics/disaster/index.php>. See also, Krueger, "Disaster Readiness and Recovery: Legal Considerations for Organic Farmers," FLAG (2007), available at <http://www.flaginc.org/topics/pubs/arts/OrganicDisaster2007.pdf>; Marlow, "Disaster Programs and the Changing Face of Agriculture in North Carolina," RAFI-USA (2007), available at <http://www.rafiusa.org/docs/disasterprograms.pdf>.

⁵ 7 C.F.R. § 400.651, "Approved insurance provider" (2010).

⁶ 7 U.S.C. § 6933. See also, 7 C.F.R. § 2.44 (2010).

⁷ 7 U.S.C. § 1508(e), (k). Section 12017 of the 2008 Farm Bill authorized USDA to renegotiate the standard reinsurance agreement with private crop insurance providers. Codified at 7 U.S.C. § 1508(k). Government costs and insurance provider returns have both increased, making crop insurance reform a topic of increasing debate. Shields, "Renegotiation of the Standard Reinsurance Agreement for Federal Crop Insurance," Congressional Research Service Report for Congress (Dec. 9, 2009), available at <http://www.nationalaglawcenter.org/assets/crs/R40966.pdf>.

⁸ 1994 Reform Act §§ 111-112 (was codified at 7 U.S.C. § 1519). – *Repealed* Pub. L. No. 104-127, Title 1, § 196(j), 110 Stat. 950 (Apr. 4, 1996) (codified at 7 U.S.C. § 7333).

coverage for a crop only in a county for which there is data related to a crop that is sufficient to make actuarial calculations. The purpose of NAP is to provide a level of protection equal to catastrophic risk coverage included in crop insurance policies to those farmers for whose crops such data does not exist and, thus, crop insurance policies are not available.

Changes that made NAP more similar to crop insurance were adopted in the Agricultural Risk Protection Act of 2000.⁹ The most significant changes under that Act included: (a) changing the deadline to apply for NAP benefits to the beginning of the crop year; (b) requiring farmers to pay an administrative fee to participate in NAP; and (c) requiring as a condition of NAP eligibility that farmers annually provide records of crop acreage, yields, and production for each eligible crop.¹⁰

Minor changes to NAP were made by the 2008 Farm Bill.¹¹ Included among these changes are: (a) a substantial increase in administrative fees; and (b) a requirement that farmers must have obtained crop insurance or NAP coverage in order to establish eligibility for most other types of disaster assistance.

C. Supplemental Revenue Assistance Program (SURE)

The Supplemental Revenue Assistance Payment Program (SURE) is a new program to provide payments to farmers for crop disaster losses that occur from 2008 through September 30, 2011.¹² The Farm Service Agency (FSA) published detailed rules for SURE on December 28, 2009.¹³

⁹ Agricultural Risk Protection Act of 2000 (2000 ARPA), Pub. L. No. 106-224, Title 1, 114 Stat. 358 (June 20, 2000) (codified at 7 U.S.C. §§ 1501-1523, 7331, 7333).

¹⁰ 2000 ARPA § 109 (codified at 7 U.S.C. § 7333).

¹¹ Food, Conservation, and Energy Act of 2008 (2008 Farm Bill), Pub. L. No. 110-246, 122 Stat. 1651 (June 18, 2008).

¹² 2008 Farm Bill § 12033 (codified at 7 U.S.C. § 1531). In addition to SURE, the 2008 Farm Bill authorized another permanent disaster program relevant to fruit growers. The Tree Assistance Program (TAP) will provide cash payments to eligible orchardists and nursery tree growers for qualifying losses of the trees themselves (as opposed to the year's crop) due to natural disaster. TAP payments cover a portion of replanting, pruning, removal, and other salvage costs for qualifying losses.

¹³ 74 Fed. Reg. 68,480 (2009) (codified at 7 C.F.R. §§ 760.601 et seq.). See also, "Livestock Indemnity Program and General Provisions for the Supplemental Disaster Assistance Program," 74 Fed. Reg. 31,567 (2009) (codified at 7 C.F.R. §§ 760.101 et seq.)

In general, to be eligible to receive SURE payments, farmers must have obtained crop insurance or NAP (Non-insured Crop Disaster Assistance Program) coverage for all crops of economic significance on the farm at the beginning of the crop year in which the crop losses occurred. Farmers could qualify for a waiver of this Risk Management Purchase Requirement in one of two ways. One way to receive a waiver was by paying a “buy-in fee.” (This option was only available for 2008 and for certain crops in 2009.) The second way to receive a waiver is by qualifying as a “limited resource farmer or rancher,” a “beginning farmer or rancher,” or a “socially disadvantaged farmer,” as determined by FSA. A “socially disadvantaged farmer or rancher” is a person who has been subjected to racial or ethnic prejudice because of membership in a group.

SURE payments are based on 60 percent of the difference between the SURE guarantee and total farm revenue for the year, as determined by FSA.¹⁴ In general, any crop insurance indemnity or NAP payment the farmer receives will be considered part of total farm revenue and will reduce the SURE payment.

III. IMPORTANCE OF DISASTER AND RISK MANAGEMENT ASSISTANCE

The seasonal nature of farming means that for many farmers, in many parts of the country, a natural disaster at the wrong time may destroy an entire crop, and it may not be possible to grow another crop until the following year. This means that farm income is highly variable, largely for reasons beyond farmers’ control. As one author has noted, “Growing produce is not the biggest hurdle facing most fresh market vegetable growers; earning a reasonable living poses the greatest challenge.”¹⁵ The central mechanism by which crop insurance and disaster assistance programs add to (rather than help to diminish) this challenge is in their reliance upon prices that do not correspond to the actual prices received by most fruit and vegetable farmers, as is discussed in further detail below.

The involvement of the federal government in farm disaster assistance has long been premised upon the difficulty of preventing or mitigating the risk of natural disaster and the necessity of domestic agricultural production to national security and well-being.¹⁶ Increasingly, there is tension between the desire to maintain a

¹⁴ 7 U.S.C. § 1531(b)(2).

¹⁵ Hendrickson, “Grower to Grower: Creating a Livelihood on a Fresh Market Vegetable Farm,” at i, University of Wisconsin Center for Integrated Agricultural Systems (2005), available at <http://www.cias.wisc.edu/wp-content/uploads/2008/07/grwr2grwr.pdf>.

¹⁶ Dismukes and Glauber, “Why Hasn’t Crop Insurance Eliminated Disaster Assistance?” USDA Economic Research Service (2005), available at <http://www.ers.usda.gov/AmberWaves/June05/Features/WhyHasntCropInsurance.htm>;

safety net and new research suggesting that agronomic practices may affect the resilience of the land. Arguably, crop insurance and disaster assistance programs may reduce the incentive for innovation in farm management practices to make farms less susceptible to drought and flooding.¹⁷ Congress and USDA should develop crop insurance and disaster program incentives for farmers to utilize farming practices (such as crop diversification, crop rotation, soil conservation, and crop type and variety selection) that increase resilience in the face of natural disaster and climate change.

A. Expansion of Crop Insurance to Cover Fruits and Vegetables Has Been Slow

Crop insurance is the most well developed tool for managing weather-related risks. But it does not provide universal coverage. Where it is supported by actuarial data, crop insurance is a highly effective risk management tool, allowing farmers to insure as much as 85 percent of their expected crop yields and up to 100 percent of their expected crop prices. However, the crops for which there are well-developed data regarding prices and yields are, by and large, the same crops that benefit from the commodity programs. Thus, for many fruits and vegetables there are no individual crop insurance policies available. Often these crops are only eligible for catastrophic coverage under the Non-insured Crop Disaster Assistance Program (NAP), which would cover only 27.5 percent of the value of a total loss.¹⁸ Crop insurance relies upon historical data, which presents a challenge for the most innovative farmers—those who may wish to transition to

Dismukes and Durst, “Whole-Farm Approaches to a Safety Net,” Economic Information Bulletin No. 15, USDA Economic Research Service (2006) (acknowledging that the current safety net may reduce risk for some, but not all, farmers, and exploring income stabilization and whole farm revenue insurance approaches), available at <http://www.ers.usda.gov/Publications/EIB15/>.

¹⁷ Lotter, et al., “The Performance of Organic and Conventional Cropping Systems in an Extreme Climate Year,” 18 *American Journal of Alternative Agriculture* 146 (2003) (describing research conducted by the Rodale Institute); A WATERSHED YEAR: ANATOMY OF THE IOWA FLOODS OF 2008, Mutel, ed. (University of Iowa 2010), available for purchase at <http://uipress.uiowa.edu/books/2010-spring/mutel-water.htm>; Boody and Krinke, “The Multiple Benefits of Agriculture: An Economic, Environmental, and Social Analysis,” Land Stewardship Project (2001), available at http://www.landstewardshipproject.org/mba/mba_report_layout_final.pdf.

¹⁸ One highly diversified farmer who sold organic vegetables at farmers’ markets, through community supported agriculture, and to restaurants and food cooperatives, successfully appealed when his initial disaster assistance payment following very severe losses represented about 2 percent of his expected income from the lost crops. NAD Director Determination No. 2008E000455 (Oct. 22, 2008).

growing fruits and vegetables, to pursuing organic certification, or to supplying crops to local consumers and institutions at retail prices—in managing their risk.

In 1994, some 16 years ago, Congress directed the Federal Crop Insurance Corporation (FCIC)—the USDA agency responsible for developing crop insurance products—to prepare a report to Congress on the feasibility of offering a crop insurance program designed to meet the needs of specialized producers of vegetables and other perishable crops who market through direct marketing channels.¹⁹ Current federal law governing some USDA programs defines “specialty crops” to include fruits and vegetables, tree nuts, dried fruits, and horticulture and nursery crops (including flowers).²⁰ That fruits and vegetables are included in the term “specialty crops” can be explained by comparing the number of acres devoted to production of fruits and vegetables to the total cropland under production in the United States. According to the 2007 Census of Agriculture, of the nearly 310 million acres of harvested cropland in the U.S. in 2007,²¹ only about 7.7 million acres were planted to fruits and vegetables.²² Thus, the number of acres devoted to production of fruits and vegetables in the United States is about 2.5 percent of the total cropland under production.

USDA’s Risk Management Agency (RMA) concluded that it had made “excellent progress” in making crop insurance protection available to specialty crop growers.²³ RMA assessed its progress against the baseline of previous availability to and participation in crop insurance programs by specialty crop farmers. RMA reported that, between 1998 and 2002, the number of insurable crops increased 29

¹⁹ 7 U.S.C. § 1508(a)(6)(C). There are several directives from Congress that encourage FCIC to expand coverage to new and specialty crops, certain perishable crops, and nursery crops. 7 U.S.C. § 1508(a)(4), (6).

²⁰ Specialty Crops Competitiveness Act of 2004, Pub. L. No. 108-465, 118 Stat. 3882 (Dec. 21, 2004) (codified at 7 U.S.C. 1621 notes § 3). This definition is incorporated into the 2008 Farm Bill §§ 7311 (Specialty Crop Research Initiative), 10,001 (Definitions), 10,103 (Inclusion of Specialty Crops in Census of Agriculture), and 10,109 (Specialty Crop Block Grants).

²¹ 2007 Census of Agriculture, Table 8, available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/index.asp.

²² 2007 Census of Agriculture: Specialty Crops, Table 1 (2009) (reporting just over 2 million acres of noncitrus fruits, about 1 million acres of citrus fruits, about 260,000 acres of berries, and about 4.4 million acres of vegetables, potatoes, and melons), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Specialty_Crops/speccrop.pdf.

²³ “Report on Specialty Crop Insurance,” USDA Risk Management Agency (May 2004), available at <http://www.rma.usda.gov/pubs/2004/specialtycrop.pdf>.

percent, the number of active policies increased 28 percent, and the amount of coverage increased 98 percent. This information is helpful, but it is difficult to assess in the absence of information about how this growth compares to the total numbers of potentially eligible crops and farmers, and the total potential liability.²⁴

Research for this report did not reveal any more recent reports of this kind. A 1999 report by the General Accounting Office (GAO) provides some context to explain the challenges to expanding availability of specialty crop insurance.²⁵ GAO noted that,²⁶

While programs for specialty crop insurance have expanded in recent years, more rapid expansion has not occurred because USDA follows a deliberate multistep process involving the assessment of risk and setting of premiums to ensure that the programs it develops are actuarially sound. This process, including testing, is lengthy, typically requiring about 5 years, because, among other things, the production history data needed to develop a specialty crop program are often not readily available. According to USDA, while the development process cannot be accelerated because of the need to ensure actuarial soundness, additional resources would allow the Department to evaluate more crops concurrently.

Actuarial soundness in crop insurance continues to be a Congressional priority, including in pilot programs.²⁷ Updated reports should be produced by RMA or GAO every two to four years as a tool to monitor, intensify, and accelerate

²⁴ For example, the Government Accountability Office (GAO) provided valuable perspective when it reported in 1999 that USDA insured 52 specialty crops and planned to begin testing coverage for another 9 specialty crops by 2001. GAO reported that these 61 crops represented a majority of the value of all specialty crops, but there remained about 300 other specialty crops for which insurance coverage would still not be available. “Crop Insurance: USDA’s Progress in Expanding Insurance for Specialty Crops,” GAO/RCED-99-67 (April 1999), available at <http://www.gao.gov/archive/1999/rc99067.pdf>.

²⁵ The General Accounting Office completed such a report in 1999: “Crop Insurance: USDA’s Progress in Expanding Insurance for Specialty Crops,” GAO/RCED-99-67 (April 1999), available at <http://www.gao.gov/archive/1999/rc99067.pdf>.

²⁶ “Crop Insurance: USDA’s Progress in Expanding Insurance for Specialty Crops,” GAO/RCED-99-67 (April 1999) (internal citation omitted), available at <http://www.gao.gov/archive/1999/rc99067.pdf>.

²⁷ 7 U.S.C. §§ 1508 and 1523.

RMA's progress in developing new risk management products for fruit and vegetable farmers. These reports should compare any expansion in coverage for specialty crops, farmers, and liability with the total pool of potentially eligible crops, farmers, and liability. GAO should also complete a policy analysis of ways to better balance the goals of actuarial soundness and expanded availability of specialty crop insurance.

In recent years, FCIC has developed several crop insurance policies for direct-marketed crops.²⁸ These policies include fresh market sweet corn, apples, cabbage, and avocados. The crop provisions for fresh market sweet corn, for example, define direct marketing as:

Sale of the insured crop directly to consumers without the intervention of an intermediary such as a wholesaler, retailer, packer, processor, shipper or buyer. Examples of direct marketing include selling through an on-farm or roadside stand, farmer's market, and permitting the general public to enter the field for the purpose of picking all or a portion of the crop.²⁹

It is difficult to find any evaluation of these relatively new crop insurance products. We recommend that such research and evaluation projects be undertaken. USDA's Farm Service Agency (FSA) should make it a high priority to build upon the experience of FCIC and to seek input from the public (including farmers who obtained crop insurance policies for direct-marketed crops) as it develops NAP and the Supplemental Revenue Assistance Payments Program (SURE) coverage for specialty crops, including those that are direct-marketed.

²⁸ The statutory provisions for crop insurance do not define "direct marketing." A useful definition is found in the Farmer-to-Consumer Direct Marketing Act of 1976. 7 U.S.C. § 3002. It defines "direct marketing from farmers to consumers" as the "marketing of agricultural commodities at any marketplace (including, but not limited to, roadside stands, city markets, and vehicles used for house-to-house marketing of agricultural commodities) established and maintained for the purpose of enabling farmers to sell (either individually or through a farmers' organization directly representing the farmers who produced the commodities being sold) their agricultural commodities directly to individual consumers, or organizations representing consumers, in a manner calculated to lower the cost and increase the quality of food to such consumers while providing increased financial returns to the farmers." See also, Neil D. Hamilton, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING* (Drake University Agricultural Law Center 1999).

²⁹ 7 C.F.R. § 457.129 (2010).

B. Existence of Crop Insurance Drives Lender Decisions

In general, federal crop insurance is obtained from private insurance companies, which have been approved by FCIC.³⁰ One of FCIC's roles is to determine which crops are insurable.³¹ Federal crop insurance is currently available in permanent policies or pilot programs for more than 100 different crops, though this number sounds more impressive than is really the case, since availability varies by state and even by county.³² Importantly, FCIC reinsures the federal crop insurance coverage sold by private providers and subsidizes farmers' premium costs.³³

Whether or not natural disaster strikes in a given year, the combination of commodity payments and crop insurance gives farmers who grow commodity crops a greater level of assurance about their income. When they review farm business plans, lenders are looking for assured income, not merely anticipated income. Without the income support from commodity programs or access to adequate crop insurance or disaster assistance, many fruit and vegetable farmers are unable to provide the same type of assurance of income to their potential lenders. Farmers whose only disaster coverage is through NAP, which is most fruit and vegetable farmers, are seen as greater risks by lenders.³⁴ This makes it more difficult for them to obtain the credit they need for their farming operations.

Family farm organizations seeking to improve access to credit for some of their most innovative farmer members—the farmers transitioning from producing tobacco to strawberries, or from selling collard greens at the farmers' market to selling them to the school district, or from raising dairy cows in confinement operations (fed on corn the farmer grows or purchases) to grazing them on pasture—have found that engaging in dialogue with agricultural lenders about the

³⁰ 7 C.F.R. § 400.651, "Approved insurance provider" (2010).

³¹ 7 C.F.R. §§ 457.2(b), 457.8(a), 407.2(b), 407.8(a) (2010). The policies issued by the reinsured companies must contain the same terms and conditions as the contract set out in the regulations published by FCIC. 7 C.F.R. §§ 457.2(b), 407.2(b) (2010). The terms of the policies and the rights and responsibilities of the parties to the contract are subject to the federal crop insurance statutes and regulations. 7 C.F.R. § 457.8, "Common Crop Insurance Policy" (2010); 7 C.F.R. § 407.9, "Group Risk Plan Common Policy" (2010).

³² See RMA's 2010 crop list web page at <http://www.rma.usda.gov/policies/2010policy.html>. Insurance can be offered for a crop if sufficient actuarial data is available to FCIC. 7 U.S.C. § 1508(a)(1).

³³ 7 U.S.C. § 1508(e), (k).

³⁴ See "A Tale of Two Farms: Disaster Programming on Conventional and Value-Added Farms" in Marlow, "Disaster Programs and the Changing Face of Agriculture in North Carolina" at 45-46, RAFI-USA (2004), available at <http://www.rafiusa.org/docs/disasterprograms.pdf>.

challenges the lenders face in approving loans to farmers whose farm business plans seem more risky has improved both sides' understanding of the other parties' needs.³⁵ But such dialogues may be impractical to carry out on a large scale, and are an imperfect cure for the lack of adequate risk management tools for fruit and vegetable farmers.

C. Disaster Designation Process Disfavors Fruit and Vegetable Farmers

FSA's approach to disaster designations is confusing.³⁶ In general, a disaster designation by the Secretary of Agriculture or a disaster declaration by the President is a necessary precondition for a county to become eligible for many disaster assistance programs. In some cases, individual farms with qualifying losses may also be eligible. Internal documents produced by FSA seem to require that there be losses of at least 30 percent to a "major crop" in the county in order for FSA to seek a disaster designation, but do not define or use the term "major crop."³⁷ Thus, it is not entirely clear whether this is an enforceable requirement, or what would constitute a "major crop" for purposes of disaster designations. Because fruits and vegetables are considered "specialty crops," and because many counties have a relatively small number of acres planted to fruits and vegetables, it seems likely that in many counties FSA will not consider fruits and vegetables to be "major crops," even for purposes of programs such as NAP and SURE, which apply to a broader range of crops than the commodity programs.

D. Natural Disaster Is a Leading Cause of Financial Distress on Farms

Crop losses due to natural disaster are a leading cause of financial difficulties on farms. Creating a means for farmers to manage risk is essential if non-farmers are

³⁵ "Are Northeast Small Farmers in a Financing Fix?: Research Results on Financing Gaps and Program Opportunities," The Carrot Project (2008), available at www.thecarrotproject.org/programs; "Farmer and Lender Project: Strategies to Sustain Agriculture and Enhance Rural Development in North Carolina," RAFI-USA (2006), available at http://www.rafiusa.org/pubs/Farmer_and_LenderProject.pdf; van Schaik, "Getting a Handle on the Barriers to Financing Sustainable Agriculture: The Gaps Between Farmers and Lenders in Minnesota and Wisconsin," Land Stewardship Project (2003), available at <http://www.landstewardshipproject.org/pdf/edsurvey.pdf>.

³⁶ The basic regulatory authority that guides FSA's disaster designation process, at least for purposes of the Emergency Loan program, is found at 7 C.F.R. pt. 1945, subpt. A (2010).

³⁷ 74 Fed. Reg. 47,186 (2009) (internal documents on file with authors). See Comments prepared by Farmers' Legal Action Group on behalf of Rural Advancement Foundation International-USA (Nov. 16, 2009), available at www.flaginc.org/topics/fedreg/comments/index.php.

to willingly become farmers, and if farmers who suffer crop losses are to be able to continue farming.³⁸

While this chapter is primarily concerned with disaster assistance programs that make direct payments or provide crop insurance indemnities to farmers, there is a need for more support to help farmers in financial distress. Agricultural mediation programs in many states have made real contributions to solving serious financial challenges in ways that satisfy both farmers and lenders.³⁹ Such programs may help fruit and vegetable farmers to communicate with their lenders about the unique character of their farming operations, as well as about opportunities for restoring and improving financial feasibility. They should be expanded and participation made mandatory. The 2008 Farm Bill authorized funds to be appropriated to make grants for a Farm and Ranch Stress Assistance Network, to meet the mental health and referral needs of farmers in financial distress.⁴⁰ These critical grants have not yet been made.

IV. AT A MINIMUM, THE NON-INSURED CROP DISASTER ASSISTANCE PROGRAM MUST PROVIDE COVERAGE EQUIVALENT TO THAT PROVIDED BY CATASTROPHIC CROP INSURANCE

The Noninsured Crop Disaster Assistance Program (NAP) was created to provide crop loss assistance to farmers who are unable to obtain federal crop insurance for a particular crop.⁴¹ Coverage greater than the catastrophic insurance level is not available under NAP. The statutory purpose of NAP is to provide equivalent *coverage*, not equivalent *prices*.⁴² Some farmers build their farming businesses upon high volumes, others upon high prices, still others upon a mixture of the

³⁸ All too often, the sequence of events goes something like this: (1) a farmer loses a crop; (2) due to the loss of income, the farmer misses a payment on a real estate or farm operating loan; and (3) if the farmer is unable to cure the default, the farmer may face repossession of farm equipment (thus making it harder to continue farming) or foreclosure of the farm, which is frequently also the farmer's home. When people talk about risk management for farmers, this is the sequence of events they are trying to forestall.

³⁹ See "Finding Common Ground: Mediating Agricultural and Other Rural Disputes," Conflict Prevention and Resolution Center, available at http://www.fsa.usda.gov/Internet/FSA_File/agsucces_0426.pdf; 7 U.S.C. §§ 5101 et seq.; Minn. Stat. ch. 583 (Minnesota Farmer-Lender Mediation Act).

⁴⁰ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title VII, Subtitle E, § 7522, 122 Stat. 1651 (June 18, 2008) (codified at 7 U.S.C. § 5936).

⁴¹ 7 U.S.C. § 7333.

⁴² 7 U.S.C. § 7333(a).

two. Disaster assistance should provide equivalent coverage for all of these business models. If farmers who sell conventional commodities at wholesale receive coverage for roughly 27 percent of their actual expected income through catastrophic level crop insurance, then farmers who sell organic crops, or heirloom varieties of tomatoes at a farmers' market, or who otherwise differentiate themselves through crop selection, farming methods, or marketing methods, must receive equivalent coverage of their actual expected income.

In order for NAP to provide coverage equivalent to catastrophic coverage under crop insurance, prices recognized under NAP, crop insurance, and disaster assistance programs for specialty crops must bear the same relationship to the actual prices received by farmers as they do for non-specialty crop farmers (i.e., farmers who grow conventional commodity crops). Currently, the gap between recognized program prices and actual prices received by farmers is greater for specialty crops than for conventional commodity crops.⁴³ Put another way, crop insurance has been designed to work well for conventional commodity crops. A concerted effort must be made to design disaster assistance programs that work as well for specialty crops as crop insurance does for conventional commodity crops.

Changes that made NAP more similar to crop insurance were adopted in the Agricultural Risk Protection Act of 2000.⁴⁴ The most significant changes under that Act included: (a) changing the deadline to apply for NAP benefits to the beginning of the crop year; (b) requiring farmers to pay an administrative fee to participate in NAP; and (c) requiring as a condition of NAP eligibility that farmers annually provide records of crop acreage, yields, and production for each eligible crop.⁴⁵

⁴³ In theory, catastrophic risk protection should cover up to 27.5 percent of a farmer's anticipated income. Suppose the actual retail price for an organic crop is 200 percent of the actual retail price for the same crop in a conventional variety; in this case, the proportion of expected income covered by NAP benefits based on conventional wholesale prices will diminish rapidly. One highly diversified organic farmer who sells vegetables to the direct market asserted in an administrative appeal that his initial NAP award covered just over 2 percent of his losses. NAD Director Determination No. 2008E000455 (Oct. 22, 2008).

⁴⁴ Agricultural Risk Protection Act of 2000 (2000 ARPA), Pub. L. No. 106-224, Title 1, 114 Stat. 358 (June 20, 2000) (codified at 7 U.S.C. §§ 1501-1523, 7331, 7333).

⁴⁵ 2000 ARPA § 109 (codified at 7 U.S.C. § 7333).

A. Catastrophic Coverage

The most familiar form of crop insurance is some form of multi-peril coverage. In general, the farmer buys multi-peril coverage for each crop individually, and indemnity payments are triggered by a variety of weather-induced losses, including low yields, poor quality, late planting, prevented planting, or forced replanting. Within this general category of coverage, the farmer may obtain what is known as catastrophic coverage (CAT) or additional coverage. Farmers pay an administrative fee to obtain CAT coverage, but the insurance premium is subsidized in full. In general, CAT coverage is triggered only when a farmer suffers losses of more than 50 percent to a crop. CAT coverage insures 55 percent of the expected market price for the crop. In theory, then, if a farmer were to lose an entire crop, the insurance indemnity would be 27.5 percent of the established price for the farmer's expected yield. On the other hand, if a farmer were to lose 49 percent of the crop, the insurance indemnity would be zero.

B. Disparities in Price Coverage

NAP and crop insurance tend to provide coverage for a greater percentage of expected farmer income for conventional commodities than for farmers who: (1) grow specialty crops, such as fruits and vegetables; (2) sell at retail prices; (3) produce and market certified organic crops; or (4) add value through production or handling practices.

Basing crop insurance indemnities upon wholesale prices may be reasonable where the vast majority of farmers sell a commodity in bulk at wholesale. But it does not necessarily follow that it is equitable to base NAP benefits and the SURE guarantee on wholesale prices for crops for the substantial number of farmers who do not sell undifferentiated commodities in bulk at wholesale, but rather sell at retail or otherwise participate in specialized niche markets. These farmers' business plans are built upon a higher per-unit value than the business plans of the farmers who produce conventional commodities for the wholesale market.

Issues related to price are critical for understanding policy concerns related to application of disaster assistance programs to fruit and vegetable crops, and they are discussed in greater detail below.

C. Disparities in Yield Coverage

Just as lack of appropriate price data hinders the effectiveness of NAP and crop insurance for specialty crops, so does lack of applicable yield data.

1. Gaps in Yield Data Present Barriers for Producers of Specialty Crops

The animating idea behind crop insurance and NAP is to use the farmer's past production in order to predict what the farmer would have produced in the absence of disaster, and then to base benefits upon that prediction. In the first instance, crop insurance and NAP rely upon a farmer's own actual production history, but if the farmer's own yield data is not available, there are mechanisms to substitute a figure based upon average yield for the crop in the county. One principal barrier for specialty crop farmers is the difficulty in establishing a substitute yield—typically a county average yield, called a “T yield”—for a noninsured crop; it is encountered by farmers who may be the only producer of a particular crop or crop variety in their county, or one of a small handful of farmers producing that crop.⁴⁶ Another barrier is the application of county expected yields to crops or varieties which are not comparable.⁴⁷

The applicable regulation is 7 C.F.R. § 1437.102(b)(4). It states that a T-yield

[w]ill be based on the most representative available historical information, as determined by [the Commodity Credit Corporation], from such sources as, but not limited to, actual acreage and production data of participating producers in the county; or in similar areas; National Agricultural Statistics Service data; Cooperative State Research, Education, and Extension Service records, Federal Crop Insurance data, and credible non-government studies. Such data is based on the acreage intended for harvest.

Compliance with the regulatory requirement is difficult for crops or crop varieties where historical yield data has simply never been collected. FSA should make a concerted effort to collect yield data for all crops, types, varieties, and intended uses for which NAP coverage is available.

Extended crop rotations are another instance where reliance upon yield data may penalize the most innovative and sustainable farmers. Some farmers may not

⁴⁶ It is encouraging to see that FSA has begun to grapple with the lack of historic yield data for many crops—and for particular crop types, varieties, and intended uses—in many counties. FSA Notice SURE-2, “Establishing 2008 Supplemental Revenue Assistance Payments (SURE) Program Crop Data,” para. 2.A (Nov. 3, 2009) (expired Jan. 1, 2010).

⁴⁷ See NAD Determination No. 2008S000071 (Apr. 17, 2008) (finding FSA's use of nonspecific grape yield data to determine benefits for Niagara grapes to be contrary to the regulation requiring the use of the most representative available historical information).

grow certain crops every year, every other year, or even every third year. This can make it difficult for farmers to construct their own Actual Production History (APH) according to current regulations, yet county expected yields may be nonexistent or inaccurate for many crops and crop varieties.

Even for relatively common fruit and vegetable crops, the data possessed by FSA regarding average yields may be sparse, dated, and inaccurate. In some ways, the problem is a vicious cycle. That is, disaster assistance programs are not designed with specialty crops in mind, thus specialty crop farmers lack incentives to participate in the programs, thus the programs do not receive accurate annual reports from these individual farms, and thus USDA lacks aggregate data to provide a sound actuarial basis for coverage. As a result, the programs remain of little benefit to many specialty crop farmers. We urge FSA to work to disrupt this pattern.

As is true for price data, it is essential for FSA to work with other agencies within USDA and with Congress to obtain funding and staff resources to collect yield data for specialty crops in order to increase the efficacy of the risk management programs provided, and consequently to increase farmer participation.

In many respects, the rule for the new SURE program, discussed below, continues the problematic approach to determining yields under NAP.⁴⁸ However, the SURE rule does set forth an intriguing new option for program participants who do not have acceptable evidence of yields. The rule states that FSA will use the higher of the participant's crop certification or the maximum average loss level to determine the farmer's crop production losses.⁴⁹ Maximum average loss level is defined as

the maximum level of crop loss that will be used in calculating SURE payments for a participant without reliable or verifiable production records as defined in this section. Loss levels are expressed in either a percent of loss or a yield per acre, and reflect the amount of production that a participant should have produced considering the eligible disaster conditions in the area or county, as determined by the FSA county committee in accordance with instructions issued by the [FSA] Deputy Administrator.⁵⁰

This “maximum average loss level” concept seems promising, in that it allows FSA to use reasonable estimates of what the farmer might have lost. The

⁴⁸ 7 C.F.R. §§ 760.638 and 760.638 (2010).

⁴⁹ 7 C.F.R. § 760.637(e)(2) and (l) (2010).

⁵⁰ 7 C.F.R. § 760.602, “Maximum average loss level” (2010).

challenge, of course, is devising guidelines to ensure that the estimates are truly reasonable, particularly for crops that FSA may have little experience with.

2. Definition of “New Producer” for Purposes of Yield Determinations Is Unduly Narrow

The NAP regulations provide for the use of unadjusted T-yields for a “new producer,” which is defined as a person who has not been actively engaged in farming for a share of the production of the eligible crop in the administrative county for more than two crop years.⁵¹ This definition defines “new producers” much more narrowly than the general USDA definition for “beginning farmers.” New producers are able to receive an approved yield based upon 100 percent of the T-yield, while beginning farmers (who may not have even been aware of the NAP program in their first years of farming) may only receive an approved yield based upon a percentage (ranging from 65 to 90 percent) of the T-yield for the first three years in the NAP program. This level of coverage provides very little incentive for farmers to enroll in the program. A broader definition of new producers would allow more beginning farmers and other farmers new to NAP to participate in NAP at an equitable rate, and to accelerate the agency’s efforts to collect yield and price data for many more specialty crops. FSA should define “new producer” to include more than those who have been farming for fewer than two years.

For beginning farmers, or for farmers seeking to diversify by adding new crops and crop varieties, the need to calculate a county expected yield presents a substantial barrier to participation in disaster assistance programs such as crop insurance and NAP. When there are few data points in the county upon which to base a county expected yield, the exact procedures that FSA will use to determine the T-yield are unclear. Certainly FSA needs adequate data in order to establish reasonable county expected yields and limit its own exposure to risk, yet these concerns must be balanced with USDA-wide priorities that encourage the production of healthy foods and the reemergence of local and regional food systems. The SURE rule states that farmers who have not met the Risk Management Purchase Requirement—discussed below—but who are eligible to participate in SURE under the waiver of that requirement, will receive a weighted yield determined at 65 percent of the county expected yield for each crop.⁵² Given the difficulty of establishing a county expected yield for many specialty crops in many areas of the country, further reducing the coverage to 65 percent of the county expected yield seems certain to discourage participation by those farmers that Congress made a particular effort to encourage to participate by creating the

⁵¹ 7 C.F.R. § 1437.102(i) (2010).

⁵² 7 C.F.R. § 760.638(d)(1) (2010).

waiver of the Risk Management Purchase Requirement in the first place. To the extent FSA must rely upon the county expected yield, it should use the full value of the established county expected yield.

3. Case Study: Sweet Corn Yields

One long-running dispute regarding yield coverage involved an application for Crop Disaster Program benefits by a farmer who had suffered losses to his 2003 fresh market sweet corn crop. This dispute reveals the challenges faced by specialty crop farmers in participating in disaster assistance programs.

The farmer had a fresh market sweet corn operation that was unique in the county, and perhaps in the region. He used a mechanical harvester and boxed the corn for sales directly to supermarket chains. Sweet corn was insurable as a “dollar crop” in every county in his state. The insurance policy guaranteed a certain number of dollars per acre. Neither RMA nor FSA accepted yield records or established an approved yield or Actual Production History for farmers who produced crops insurable as dollar crops. Though the applicable agency Handbook required FSA to consult a number of reliable sources, and though the state university had many years of yield records for sweet corn production throughout the state, FSA had an “unwritten policy” of relying solely upon data from the National Agricultural Statistics Service (NASS) in order to determine county average yields. But NASS’s data was based on converting farmers’ yields reported as dozens of ears to hundredweight, though NASS acknowledged that the weight of sweet corn varies depending upon variety, weather, and soil type.

The National Appeals Division (NAD) Hearing Officer ruled that FSA failed to follow procedure when it established the county average yield for sweet corn. FSA did not appeal the NAD decision, but issued a new decision four months later essentially reasserting its original position. When the farmer appealed this new decision, FSA withdrew the decision and insisted there was no agency action for NAD to review.⁵³ FSA did not issue a new decision, and the farmer again appealed. The NAD Hearing Officer found that the agency erroneously failed either to act on the farmer’s application or to implement the April 2007 NAD decision. The record does not disclose whether the agency ever did adjust the county average yield, or whether the farmer ever received Crop Disaster Program (CDP) benefits for his 2003 fresh market sweet corn crop.

This case is instructive for a variety of reasons. First, it highlights a common challenge for farmers in terms of the unit of measure to be used for their crops. Measuring fresh sweet corn in terms of dozens of ears is practical, yet is

⁵³ NAD Case No. 2007E000838 (Hearing Officer Decision Nov. 15, 2007, and NAD Director Determination Feb. 4, 2008).

apparently less desirable in the eyes of statisticians. Second, this case demonstrates how the lack of data possessed by USDA can be self-inflicted: multiple USDA agencies declined to accept yield reports from farmers who produce dollar crops, and FSA failed to make even the minimal effort needed to obtain yield data from adjoining states or the local university. Despite official FSA policy calling for consultation of multiple sources, there was an exclusive reliance upon NASS data, even when there was good reason to question the accuracy and reliability of that data. All of these patterns must be corrected if disaster assistance programs—old and new alike—are to adequately and equitably serve all farmers.

D. Need to Cover Specific Crop Type, Variety, and Intended Use

Crop insurance and disaster assistance programs must better serve fruit and vegetable farmers by collecting data and providing price coverage that is more precisely related to the actual production and marketing methods used by the farmer. FSA has policy language that commits the agency to seek “the best available information” related to the average market price for the specific crop type, variety, and intended use.⁵⁴ This policy is important, because the expected price for a tomato can vary dramatically, based upon whether it is sold by the truckload or the bushel to a cannery or packinghouse, or by the pound at a farmers’ market. The price may also vary depending upon whether the tomato is a conventional hybrid, an heirloom variety, or certified organic. Crop insurance or disaster assistance programs that rely only upon conventional wholesale prices to determine coverage and that do not address these important differences do not adequately serve fruit and vegetable farmers, instead making it more difficult for them to manage their risk in case of a natural disaster.

V. EFFECTIVE COVERAGE IN ADDITION TO CATASTROPHIC COVERAGE MUST BE MADE AVAILABLE TO FRUIT AND VEGETABLE FARMERS

A. Authorize “Buy Up” Coverage Under NAP

Additional coverage under a crop insurance policy, sometimes called “buy-up” coverage, is a level of coverage exceeding the 50 percent yield protection and 55 percent price protection of catastrophic (CAT) coverage.⁵⁵ If additional coverage is available under the policy, as it is for most multi-peril crop insurance, a farmer may obtain it by paying not only the administrative fee that is required for CAT coverage but also an insurance premium that increases with increasing

⁵⁴ NAP Handbook, para. 108C, page 3-7 (June 12, 2007).

⁵⁵ 7 U.S.C. § 1508(c).

coverage. Under additional coverage, a farmer may insure up to 85 percent of yield and as much as 100 percent of the expected market price.⁵⁶

Until data collection has improved enough to develop crop insurance for crops currently covered only by NAP, Congress should authorize NAP coverage beyond the catastrophic level similar to additional coverage under crop insurance. If Congress were to take this step in 2010, even if only in a pilot program, it would allow at least a year of data to be collected before the next Farm Bill.

B. Supplemental Revenue Assistance Payment Program (SURE) Needs Improvement to Provide Adequate Coverage

The Supplemental Revenue Assistance Payment Program (SURE) is a program created under the 2008 Farm Bill to provide payments to farmers for crop losses due to natural disasters that occur from 2008 through September 30, 2011.⁵⁷ FSA published detailed rules for SURE on December 28, 2009.⁵⁸ As directed by Congress, SURE builds upon and supplements the coverage provided by crop insurance and NAP.⁵⁹ This means that, to the extent that crop insurance and NAP fail to provide adequate coverage for fruit and vegetable crops for the reasons discussed above, SURE, too, is likely to provide inadequate coverage for these crops. In any event, in order to evaluate the effectiveness of SURE, it is important to understand the basic structure of the program. This is set forth below.

1. Farmer Eligibility for SURE

Farmers must satisfy two requirements in order to be eligible for SURE. First, farmers must show that they suffered qualifying crop disaster losses by satisfying either (a) or (b) below:⁶⁰

⁵⁶ 7 U.S.C. § 1508(b)(5), (d).

⁵⁷ 2008 Farm Bill § 12033 (codified at 7 U.S.C. § 1531). In addition to SURE, the 2008 Farm Bill authorized another permanent disaster program relevant to fruit growers. The Tree Assistance Program (TAP) will provide cash payments to eligible orchardists and nursery tree growers for qualifying losses of the trees themselves (as opposed to the year's crop) due to natural disaster. 7 U.S.C. § 1531(f). TAP payments cover a portion of replanting, pruning, removal, and other salvage costs for qualifying losses.

⁵⁸ 74 Fed. Reg. 68,480 (2009) (codified at 7 C.F.R. §§ 760.601 et seq.); See also, 74 Fed. Reg. 31,567 (2009) (codified at 7 C.F.R. §§ 760.101 et seq.) (setting forth general provisions for permanent disaster programs authorized in the 2008 Farm Bill).

⁵⁹ 2008 Farm Bill § 12033 (codified at 7 U.S.C. § 1531(b)).

⁶⁰ 7 C.F.R. §§ 760.601(c), 760.610(a)(3), and 760.102, "Qualifying loss" (2010).

- a. Live in a county that was designated a disaster by the Secretary of Agriculture, or in a county that borders a disaster county;
- or
- b. Have suffered eligible total crop losses of 50 percent or more of normal production on the farm.

Second, farmers must have obtained crop insurance or NAP coverage for all crops of economic significance on the farm at the beginning of the crop year in which the crop losses occurred (a “Risk Management Purchase Requirement”) *or* qualify for a waiver of this requirement.⁶¹ Farmers could qualify for a waiver of the Risk Management Purchase Requirement in one of two ways. For the 2008 crop year, farmers could receive a waiver by paying a fee equal to the administrative fee for CAT insurance or NAP coverage. The second way to receive a waiver of the Risk Management Purchase Requirement is by qualifying as a “limited resource farmer or rancher,” a “beginning farmer or rancher,” or a “socially disadvantaged farmer,” as determined by FSA. This second type of waiver is available in all years in which SURE is available. “Socially disadvantaged farmers” include American Indians and Alaskan Natives, Asians and Asian-Americans, Blacks and African-Americans, Native Hawaiians and other Pacific Islanders, and Hispanics.⁶²

2. SURE Payments

SURE payments are based on 60 percent of the difference between the SURE guarantee and total farm revenue for the year, as determined by FSA.⁶³ In general, any crop insurance indemnity or NAP payment the farmer receives will be considered part of total farm revenue and will reduce the SURE payment.

There are two practical points to note about SURE. First, SURE may mark a decisive shift toward “whole farm” disaster assistance, where disaster losses are evaluated based upon all crops and production on the farm, and their value, rather than simply yields. This actually makes it more difficult in some cases for farmers to qualify for SURE payments than to qualify for programs that make payments based upon losses to one crop. This is because losses to one crop may be balanced out by good yields and/or prices for another crop. Diversification of crops is a key risk management strategy for many fruit and vegetable farmers, yet FSA’s interpretation of the statutory term “crop of economic significance” undermines

⁶¹ 7 U.S.C. § 1531(g); 7 C.F.R. §§ 760.610(a)(1), and 760.104 - 760.107 (2010).

⁶² 7 U.S.C. § 2279(e).

⁶³ 7 U.S.C. § 1531(b)(2).

farmers' efforts to manage risk through diversification since a farmer loses risk protection for crops that represent a small portion of the total expected revenue, even if all of the farmer's crops meet this description, e.g., 12 crops each contributing 8.33 percent of the farmer's expected revenue. This is discussed further below. The second point is that, where crop insurance and NAP tend to provide for relatively quick payments to farmers, SURE requires calculations, including calculations of a national average market price, which will substantially delay payments to farmers, even when the program is fully implemented.

VI. COLLECT AND USE PRICE DATA FOR SPECIALTY CROPS

The central mechanism by which crop insurance and disaster assistance programs fail to equitably address fruit and vegetable farmers' risk is in their reliance upon prices that do not correspond to the actual prices received by many of these farmers. The markets for fruits and vegetables are more numerous, varied, and in many cases less formal than those for nonperishable crops. These multiple marketing mechanisms for fruits and vegetables present some challenges for data collection and analysis. Nonetheless, collecting this data must be a top priority. Ideally USDA should pursue two approaches simultaneously—(1) collecting data to establish average prices for each combination of crop type, production practice, market, and region, and (2) allowing an individual farmer to provide documentation establish his or her own Actual Price History that would be the basis for price coverage, similar to how a farmer's documented Actual Production History is currently used as the basis for yield coverage.⁶⁴ These two approaches would likely reinforce and strengthen one another.

A. NAP Regulations That Base Benefits Upon Average Market Price Make NAP Less Effective for Specialty Crop Farmers

The term "average market price" is used, but not defined, in the statutes governing NAP and SURE.⁶⁵ The SURE statute states that the "national average market price" for a crop for which a farmer has received NAP benefits may not exceed the price of the crop established under NAP.⁶⁶ Thus, only if NAP provides adequate price protection to producers of fruits and vegetables, other specialty crops, organic crops, and value-added agricultural products, will SURE do so.

⁶⁴ The Risk Management Agency has several promising pilot projects to provide crop insurance coverage based upon "Actual Revenue History (ARH)." See Final Resolution (strawberries), available at <http://www.rma.usda.gov/fcic/2009/312strawberry.pdf>.

⁶⁵ 7 U.S.C. §§ 7333 and 1531(b)(4)(B)).

⁶⁶ 7 U.S.C. § 1531(b)(4)(C). See also, 7 C.F.R. § 760.640(c) (2010).

FSA has authority to amend the regulations for NAP in order to fix this problem and to provide adequate price protection.⁶⁷

Many fruits and vegetables, organic crops, direct-marketed crops, value-added products, and other specialty crops remain ineligible for crop insurance in most counties; therefore, an evaluation of disaster assistance programs for these crops must focus on NAP. The NAP regulations provide that an “average market price” will be used to calculate NAP assistance and will be:

- (1) A dollar value per the applicable unit of measure of the eligible crop;
- (2) Determined on a harvested basis without the inclusion of transportation, storage, processing, marketing, or other post-harvest expenses, as determined by [the Commodity Credit Corporation];
- (3) Comparable with established FCIC prices; and
- (4) Determined, as practicable, for each intended use of a crop type within a State, as determined by CCC, for a crop year.⁶⁸

Paragraphs (3) and (4) are in some tension with one another. Established FCIC prices under (3) are generally based upon wholesale prices for commodities, so they will not be “comparable” to prices that are targeted to each intended use of a crop type under (4). For example, direct marketing to consumers or retail outlets is a distinct intended use—one with prices that differ from established FCIC prices for fruits and vegetables that will be canned, frozen, or processed. FSA should give greater weight to the more specific price determination in factor number 4 when calculating average market price for purposes of direct-marketed specialty crops.

B. Evaluate Current Policies for Determination of Average Market Price in NAP

One notable feature of the NAP regulations is how little guidance they actually provide to FSA in making determinations of average market price, particularly for the many crops, crop varieties, regional markets, and end uses for which there is no comparable FCIC price.⁶⁹ In fact, crop insurance is typically not available (and thus there is no FCIC price) for NAP crops precisely because of a lack of actuarially sound data.

⁶⁷ 7 U.S.C. § 7333(d)(2) (payment will be based on “the average market price for the crop (or any comparable coverage determined by the Secretary)”).

⁶⁸ 7 C.F.R. § 1437.11(a) (2010).

⁶⁹ 7 C.F.R. § 1437.11 (2010).

1. Best Available Information

The agency Handbook used by FSA to administer NAP emphatically states that, in establishing the average market price, each FSA state committee must use “the best available information.”⁷⁰

The Handbook states that,⁷¹

Sources of information may include, but are not limited to: the National Agricultural Statistics Service (NASS), Cooperative State Research, Education, and Extension Service (CSREES), Rural Development, County Agricultural Commissioners’ Office, local markets, [FSA county committees’] knowledge, prices in similar areas, and other reliable sources, such as universities, Agricultural Marketing Service (AMS) Market News, and buyers.

As noted above, FSA is also to ensure that established average market prices for crops are comparable with established FCIC prices for determining crop insurance indemnities. Finally, the Handbook notes that, FSA state committees must consider any available NASS information for the crop, but expressly provides that FSA state committees are not required to base the price solely on NASS data.⁷² Conspicuously lacking is any guidance or clear standards for how FSA is to determine which data is the “best available.” Price data for fruits and vegetables currently collected by USDA’s Economic Research Service is limited largely to wholesale prices for a limited number of crops in a handful of major cities.⁷³ Yet it seems self-evident that the “best available” data is the data that most closely matches the farmer’s production and marketing practices.

Paragraph 108E of the NAP Handbook sets forth a methodology for establishing the average market price that depends heavily upon historic data. Yet this methodology glosses over the question of the *source* from which FSA is to obtain the market prices for the previous five years, as well as the question of how to evaluate what is the “best data.” In addition, this methodology fails to address the adjustments to historical prices made to prices in the crop insurance context in order to forecast expected market price.

⁷⁰ NAP Handbook, para. 108C, page 3-7 (June 12, 2007).

⁷¹ NAP Handbook, para. 108C, page 3-7 (June 12, 2007).

⁷² NAP Handbook, para. 108C, page 3-7 (June 12, 2007).

⁷³ See, e.g., “Briefing Rooms: Fruit and Tree Nuts,” USDA Economic Research Service, available at <http://www.ers.usda.gov/Briefing/FruitAndTreeNuts/>; “Briefing Rooms: Vegetables and Melons,” USDA Economic Research Service, available at <http://www.ers.usda.gov/Briefing/Vegetables/>.

The SURE regulation provides little improvement upon the NAP regulation. The SURE rule states that FSA will establish the national average market price using the best sources available, as determined by the Deputy Administrator of FSA, which may include, but are not limited to, data from NASS, Cooperative Extension Service, Agricultural Marketing Services, crop insurance, and NAP.⁷⁴ The SURE rule thus ratifies and extends the lack of clarity in NAP. Both the NAP and SURE rules should be clarified regarding determinations of average price.

2. Unique Prices for Crop Variety, Type, and Intended Use

Paragraph 108F of the NAP Handbook, however, bears substantial promise as an approach to determine average market prices in an agricultural system where USDA embraces a mission of nurturing beginning farmers and supporting local food systems and production of healthy fruits and vegetables.

Paragraph 108F provides:

[The FSA State Committee (STC)] shall ignore small differences in prices for a crop based on different types or varieties or various intended uses. However, if there is a significant amount of production being marketed in a region at significantly different levels of compensation, STC shall determine whether to establish different prices.

As applicable, if STC determines with credible data that:

- a different type or variety of a crop has historically been valued at a significantly different price when compared to the average market price of other types or varieties of this crop, STC shall establish a separate price for the type or variety of the crop.
- a significant amount of a crop has been historically marketed in a county or counties under a specific intended use and at a price that is significantly different than the average price received for the crop without regard to intended use, STC shall establish a separate price for the crop based on intended use.

The touchstones set forth in paragraph 108F—whether a “significant amount” of production being marketed in a region “at significantly different levels of compensation” based on type, variety, or specific intended use—are good first steps toward defining when a separate average market price should be

⁷⁴ 7 C.F.R. § 760.640(a) (2010). See also, 7 C.F.R. §§ 760.632(g) and 760.637(b) (2010) (requiring use of “best available data” or “most accurate data available” to determine acreage and yields).

established.⁷⁵ More guidance regarding what counts as “significant” with respect to the amount of production or variation in price would be helpful. At the same time, given the variety of regions and counties in which this policy must be applied, it is unclear whether FSA has sufficient data or uniformity to choose a universally applicable percentage to qualify as “significant.” Moreover, this policy could still leave the most innovative farmers with less of a safety net than their peers. For example, the first farmer in a county to sell strawberries or pumpkins in a “you pick” operation, or the first farmer in a county to grow edamame for the fresh market, rather than for processing, will not be able to demonstrate that a significant amount of the crop has historically been marketed in the same way, unless a broader search for similar operations is conducted. The additional guidance in Paragraph 108G of the NAP Handbook, that FSA shall establish average market prices that are reasonable when compared to local markets, provides at least some standard against which FSA’s actions in establishing NAP prices may be reviewed.

FSA’s policies, practices, and standards must continue to evolve in order to “catch up” with changes and developments made by farmers in the production and marketing of specialty crops. The NAP Handbook provisions discussed above are all dated June 12, 2007.

C. Provide an Opportunity for Farmers to Submit Price Information When They Apply for NAP and SURE

In addition to actively collecting data through means such as the census of agriculture, other NASS surveys, and USDA Economic Research Service research, FSA could collect data passively by providing an opportunity for farmers to submit historical price records when they apply for NAP and SURE.⁷⁶ The combination of active and passive data collection could dramatically increase the quantity and improve the quality of data available to USDA when it must make decisions on NAP and SURE benefits for individual farmers. Making benefit awards that are based upon truly applicable data would help improve the effectiveness and equity of the programs, and would likely reduce the number of appeals brought before NAD.

⁷⁵ It is encouraging that FSA recently signaled its intent to recognize distinctions of crop, variety, and intended use when determining national average market price under SURE. FSA Notice SURE-2, “Establishing 2008 Supplemental Revenue Assistance Payments (SURE) Program Crop Data,” para. 3 (Nov. 3, 2009) (expired Jan. 1, 2010). The SURE regulations state that the SURE yield will be determined for each crop, type, and intended use on a farm. 7 C.F.R. § 760.638(a) (2010).

⁷⁶ Regulations for applying for SURE are found at 7 C.F.R. §§ 760.620 and 760.613 (2010).

Just as farmers are able to create their own “Actual Production History” to be the basis of their yield coverage under NAP and crop insurance, farmers should ultimately be able to create an “Actual Price History” for particular crop types, varieties, and intended uses that could be the basis for their price coverage under those programs.

D. Organic Prices Have Not Been Recognized

An analysis of the treatment of organic crops is relevant to this discussion for two reasons: (1) A higher proportion of organic farmers grow fruits and vegetables than farmers in general; and (2) because organic crops are subjected to disadvantages similar to fruits and vegetables, the analysis of problems and potential solutions is similar, and thus organic farmers are potential allies in seeking change.

In general, crop insurance and disaster assistance programs have provided assistance to organic farmers based upon the typically much lower conventional price for the crops grown. The most egregious instance of this occurred under the various ad hoc programs authorized with slight modifications for crop losses over the past two decades.⁷⁷ In the mid-1990s, three organic farmers in Michigan argued that they should have received payments based on the “end use” of their black turtle beans, pinto beans, and adzuki beans in the certified organic market. The disaster assistance regulations in effect at the time required FSA to use different payment rates when agricultural products had different end uses and the different rates were supported by data.⁷⁸ A 1998 federal district court decision held that, under those regulations, the organic farmers were entitled to a separate payment rate for their organically grown crops.⁷⁹

FSA then issued regulations for a crop disaster program covering losses in the years from 1994-1998 which authorized FSA county committees to establish up to three separate payment rates for the same crop when supporting data showed a significant difference in yield or value based upon a distinct and separate end use

⁷⁷ These programs have existed under a variety of names: Disaster Payment Program, Crop Loss Disaster Assistance Program, and Crop Disaster Program. For ease, all of these programs are referred to here as crop disaster programs, or CDP. In general, regulations for all of these programs were adopted without benefit of notice-and-comment rulemaking.

⁷⁸ See 7 C.F.R. § 1477.6 (1995); 57 Fed. Reg. 10,963 (1992).

⁷⁹ *Pringle v. United States*, 1998 U.S. Dist. LEXIS 19378 (E.D. Mich. 1998) (unpublished).

of the crop.⁸⁰ However, the regulations specifically prohibited FSA county committees from establishing separate rates or yields for crops with different cultural practices, including organic practices. Similar regulations prohibiting separate payment rates for organic practices were adopted for the versions of CDP covering losses from 2000 to 2002.⁸¹

Some organic farmers challenged these regulations before NAD, arguing that their organic crops should receive 2001 and 2002 CDP benefits based on organic prices.⁸² The farmers' administrative appeals were unsuccessful, and they filed suit in federal district court, arguing that the CDP regulations which prevented them from receiving assistance at a higher rate for their losses of higher-value organic crops were arbitrary and capricious. In 2006, a federal district court judge upheld the regulation and ruled against the organic farmers because of the explicit language in the rule excluding organic crops as separate varieties.⁸³

Based upon recent statements by USDA, the agency may be prepared to reexamine its previous unwillingness to recognize organic crops as having a distinct end use. Recognizing organic prices is one obvious application of Paragraph 108F of the NAP Handbook, whose direction to recognize different crop varieties and intended uses is discussed above. FCIC has been directed to carry out research and development to develop a crop insurance policy specifically for organic farmers.⁸⁴

A related issue is the problem for organic farmers who have not been able to obtain crop insurance coverage for the full prices their organic crops receive. The federal crop insurance basic provisions do not specifically address the issue of the expected market price for organic farming practices. USDA's Risk Management Agency (RMA) published a Fact Sheet on Organic Farming Practices which states that the price elections or insurance dollar amounts available on certified organic

⁸⁰ See 7 C.F.R. § 1477.202(d) (2000); 64 Fed. Reg. 18,554 (1999) (1998 Single Year and Multi-Year Crop Loss Disaster Assistance Program).

⁸¹ See 7 C.F.R. § 1480.12(d) (2002); 66 Fed. Reg. 15,979 (2001) (2000 Crop Disaster Program); and 7 C.F.R. § 1480.12(d) (2004); 68 Fed. Reg. 37,943 (2003) (2001-2002 Crop Disaster Program).

⁸² NAD Director Review Determinations 2004E000091 (June 29, 2004) and 2004E000539 (Aug. 16, 2004). Another organic farmer filed a similar unsuccessful appeal on the same issue related to the 2003-2004 CDP. NAD Hearing Officer Decision 2005E000971 (Oct. 12, 2005).

⁸³ *Partlo v. Johanns*, 2006 U.S. Dist. LEXIS 43071 (D.D.C. 2006). The district court was affirmed without a written opinion. *Partlo v. Johanns*, 2007 U.S. App. LEXIS 9963 (D.C. Cir. 2007).

⁸⁴ 7 U.S.C. § 1522(c)(10).

acreage, transitional acreage, and any buffer zones for a given crop year will be the price elections or insurance dollar amounts published by RMA for the crop grown using conventional means.⁸⁵

Despite receiving coverage for lower prices than they generally receive, organic farmers pay more for crop insurance coverage above the catastrophic level. The standard federal crop insurance policy provisions do not specifically address premium amounts. In practice, however, organic farmers are assessed a 5 percent premium surcharge when they purchase yield-based additional coverage or crop revenue coverage.⁸⁶ This surcharge purportedly reflects an adjustment for additional risk associated with covering organic farming practices.⁸⁷

The 2008 Farm Bill directs FCIC to review the underwriting, risk, and loss experience of organic crops, whether or not covered by crop insurance policies, and to determine whether there is a consistent, significant difference between the loss history for organic and nonorganic production.⁸⁸ The review is to be updated on an annual basis. FCIC is directed to eliminate or reduce the premium surcharge it charges for coverage of organic crops *unless* its review documents a significant, consistent, and systemic variation in loss history between organic and nonorganic crops, either as a whole or for an individual crop.⁸⁹

E. Organic Production and Market Data Initiative

Congress authorized and provided funding in the 2008 Farm Bill for a production and market data initiative for organic agricultural products.⁹⁰ This is one important component and model for the type of data collection that is needed.

⁸⁵ “Organic Farming Practices: 2007 Insurance Fact Sheet,” Risk Management Agency Fact Sheet, Program Aid Number 1912 (Dec. 2006), available at www.rma.usda.gov/pubs/2006/organics.pdf.

⁸⁶ Testimony of Mark Lipson, Review of Economic Impacts of Production, Processing, and Marketing of Organic Agricultural Products, U.S. House of Representatives Committee on Agriculture, Subcommittee on Horticulture and Organic Agriculture (Washington, DC, Apr. 18, 2007), available at http://ofrf.org/policy/federal_legislation/federal_legislation.html. Lipson is the Public Policy Director of the Organic Farming Research Foundation, www.ofrf.org.

⁸⁷ See Risk Management Agency Fact Sheet, “Organic Farming Practices: Insurance Fact Sheet,” Program Aid Number 1912 (March 2008), at www.rma.usda.gov/pubs/2006/organics.pdf.

⁸⁸ 2008 Farm Bill § 12023 (codified at 7 U.S.C. § 1522(10)).

⁸⁹ 2008 Farm Bill § 12023 (codified at 7 U.S.C. § 1522(10)(B)(ii)).

⁹⁰ 2008 Farm Bill § 10302 (codified at 7 U.S.C. § 5925c).

USDA has begun to carry out this initiative, and has expressed its own desire to “fill a data gap which has existed for many years.”⁹¹ FSA will need sufficient resources to be appropriated to carry out comprehensive price data collection for both organic and conventional crops.⁹² Data collected should include both wholesale and retail prices for farmers who sell their products to elevators, brokers, distributors, grocery stores, food cooperatives, restaurants, schools, hospitals, government institutions, and directly to consumers (through farmers’ markets, farmstands and on-farm stores, pick-your-own operations, community supported agriculture, and other means). The Farm Bill requires USDA to produce a report that describes the progress made in implementing the organic data collection initiative and identifying further data needs.⁹³ The Farm Bill authorizes \$5 million in mandatory funding for the organic production and market data initiative for each fiscal year from 2008–2012.

Although crop insurance coverage for organic crops is currently available only at expected conventional price levels, this is likely to change rapidly as USDA implements the organic data collection initiative, and recognizes organic crops as crops having a distinct intended use.

F. Case Studies of Concerns Relating to FSA Determinations of Average Market Price Under NAP

One excellent way to get a sense of some of the types of difficulties farmers encounter with disaster assistance programs is by reviewing decisions from court cases and administrative appeals. Determinations in administrative appeals of FSA decisions are made by NAD within USDA. Reviewing NAD decisions reveals a number of problems farmers have encountered in NAP and other disaster assistance programs.

⁹¹ “Status of Organic Production and Market Data Activities as Required by the 2008 Farm Bill,” USDA Report to Congress (Dec. 2008).

⁹² See Lipson, “Written Testimony of the Organic Farming Research Foundation,” Testimony Before the House Committee on Appropriations, Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies (May 11, 2009), available at http://ofrf.org/policy/federal_legislation/090501_house_approps_testimony.pdf; “Making the Case for Funding the Organic Production and Marketing Data Collection Initiative: Stories from Farmers,” Organic Farming Research Foundation (July 1, 2009), available at http://ofrf.org/policy/federal_legislation/odi_farmer_stories.pdf.

⁹³ 2008 Farm Bill § 10302 (codified at 7 U.S.C. § 5925c).

1. FSA Allowed to Average Tiered Contract Prices Without Regard to Frequency with Which Different Prices Are Triggered

The farmer produced hybrid onion seed under a contract. The contract provided that the buyer would pay \$20 per pound for production from 0 to 300 pounds per acre, \$10 per pound for production from 301 to 1,000 pounds per acre, and \$2 per pound for production of 1,001 pounds and higher per acre. The parties agreed that seed contracts provided the best and perhaps only data regarding prices farmers received for hybrid onion seed. The evidence indicated that typical production for the appellant and other local farmers was between 300 and 400 pounds per acre, though there was evidence of one farm that produced over 1,001 pounds per acre. FSA established an average market price that was a simple arithmetic average of the three tiered prices, without regard to the frequency with which each of those prices were paid. The NAD Director determination upheld the FSA action, because the regulations and handbook did not require one appropriate method for calculating an average market price.⁹⁴

These cases demonstrate the failure of the regulations and handbooks to ensure that FSA's determinations result in an average market price that represents the actual average market price received by farmers.⁹⁵

2. FSA Price and Deduction for Avoided Harvest Expenses Found to Be Unsubstantiated

The farmer grew approximately 60 different fruit and vegetable crops, and filed for NAP benefits for 19 crops. The farmer calculated that the NAP payments initially awarded covered about 2.17 percent of the value of his 2007 crop loss. The farmer presented data from Extension, universities, and an informal survey conducted by an economic development consultant from the state department of agriculture, all demonstrating average prices significantly higher than those relied upon by FSA. Based on this data, the farmer argued that FSA did not establish average market prices that are reasonable when compared to local markets. The

⁹⁴ NAD Director Determination No. 2004W000899 (Jan. 13, 2005). Similar cases include NAD Director Determination No. 2005W000471 (Aug. 24, 2005) and NAD Director Determination No. 2005W000722 (Oct. 26, 2005).

⁹⁵ In addition to the difficulty this farmer experienced related to the language in his contract, many farmers fear a trend in which both private lenders and government programs look more favorably upon applications from farmers whose crops' ultimate dispositions are settled under production or marketing contracts. Farmers who prefer to retain their independence and market their crops after harvest, rather than have their fate tied to one buyer from the beginning of the season, urge that FSA programs not be designed to create a direct or indirect preference for farmers under contract.

NAD Director concluded that FSA's documentation was incomplete, and therefore erroneous.⁹⁶ The NAD Director excused FSA's failure to use some of the data, because the data was not available to FSA at the time it was establishing average market prices. However, the data collected in the informal survey, for example, could just as readily have been collected by FSA as by the farmer. Arguably, under applicable policies in the NAP Handbook, FSA had a duty to collect that data.

This farmer also successfully challenged outdated, inapplicable, and unreasonably high deductions made by FSA for savings due to not harvesting a crop (the unharvested payment factor). The NAD Director found that FSA's unharvested payment factors were also inadequately documented and thus erroneous.

While stating that FSA shall use the best available information, the current regime appears to place the burden of collecting the best available information upon the farmer. To add insult to injury, even when the farmer goes to considerable effort and perhaps expense to collect the data, the farmer is at risk of being told that he or she has provided the data too late. It would not be efficient to force farmers to challenge average market prices determined by FSA every time they file an application for NAP coverage, though it would be desirable to create a streamlined mechanism for farmers to report the prices they receive, just as they currently report their yields.

This case underscores the critical importance of an effort at USDA to create, collect, and collate comprehensive wholesale and retail prices for all NAP crops nationwide. Though this is not a small task, it is the only way for USDA to provide NAP coverage that is equivalent to CAT-level crop insurance coverage.

VII. COLLECT AND USE YIELD DATA FOR SPECIALTY CROPS

With adequate price data as the most needed improvement to federal disaster assistance programs, improving collection of yield data for specialty crops as well as for organic, value-added, and direct marketed crops, would likely make the second greatest improvement. Many of the issues are similar to those for collection and use of price data, but the applicable regulatory and handbook sections are slightly different.

The current state of data regarding yields produced and prices received by farmers for specialty crops is limited and patchy. Improving collection of data related to specialty crops has been a mandate for FCIC since at least 1994.⁹⁷ This goal must

⁹⁶ NAD Director Determination No. 2008E000455 (Oct. 22, 2008).

⁹⁷ 7 U.S.C. § 1508(a)(6)(A).

be made a high priority throughout USDA. Exacerbating the challenges posed by a lack of a comprehensive, centralized body of data regarding specialty crop yields and prices at USDA has been FSA's reluctance to collect and rely upon other sources of data, despite a stated policy of relying upon the best available information.

As with the price term used in SURE, the yield term in SURE is based upon the yield established under crop insurance or NAP. The challenges for producers of fruits and vegetables and other specialty crops with respect to yields may not be obvious, but they pose substantial barriers.

A. Start with Data that Are Readily Available

As stated above, price and yield data for specialty crops, as well as for organic, value-added, and direct marketed crops, tend to be limited and patchy. This is true, especially in comparison to conventional commodity crops. Yet many farms producing specialty crops as defined above have excellent production records, and have price and yield records that can be readily confirmed by independent sources. For example, a farmer might have a contract to sell organic tomatoes to a processor. Many of these farms are part of the "agriculture of the middle" that straddles the line between large and small and between conventional commodities and specialty crops. Farms from the agriculture of the middle will be crucial to rebuilding local and regional food systems.⁹⁸ We urge FSA to begin collecting and using this data in NAP and SURE programs. These steps can be taken under existing FSA policies requiring the agency to utilize the best available information and authorizing FSA to treat different types, varieties, and intended uses of crops as distinct crops.⁹⁹

B. Define "Available Information" to Include Information That Could Be Obtained by Making a Reasonable Effort

As noted above, FSA could substantially improve the disaster assistance it provides by clarifying its use of "best available information" and similar terms in the context of average price and yield data, and moving the standards from the FSA Handbooks to the regulations. One meaning of "available information" could

⁹⁸ See generally, *FOOD AND THE MID-LEVEL FARM: RENEWING AN AGRICULTURE OF THE MIDDLE*, Lyson, et al., eds. (MIT Press 2008).

⁹⁹ It is encouraging that FSA has acknowledged the need to sort price data by crop, type, and intended use, though the notice does not appear to acknowledge that historic price data has frequently not been collected or used with this level of precision under NAP. FSA Notice SURE-2, "Establishing 2008 Supplemental Revenue Assistance Payments (SURE) Program Crop Data," para. 2.B (Nov. 3, 2009) (expired Jan. 1, 2010). See also, 7 C.F.R. § 760.638(a) (2010).

be “information already collected by or already in the possession of FSA.” However, a better definition of this term would be “information that can be obtained by FSA with a reasonable effort.” A reasonable effort might include research or direct contact with Extension, universities, and farmers’ markets or nonprofit organizations whose members are active in direct marketing in the applicable state and neighboring states. A regulatory clarification of this nature would likely need to be emphasized at the highest levels of FSA in order to create a shift in the organizational culture.

VIII. REPORTING AND RECORDKEEPING OBLIGATIONS

This section is concerned with the recordkeeping burdens placed upon farmers who seek to participate in SURE or other disaster assistance programs. To some extent, SURE relies upon yields established for the purpose of crop insurance and NAP. Yet the SURE rule does create recordkeeping obligations for farmers.¹⁰⁰ As noted above, many specialty crop farmers maintain farm business records that would meet FSA requirements, including third-party verification, for evidence of yield and price. FSA should begin by collecting this readily available information from farmers who wish to participate in more equitable disaster assistance programs. At the same time, it would be helpful for FSA to engage in substantial outreach, education, and technical assistance for farmers new to these programs and to formalized recordkeeping requirements.

The comments that follow arise largely out of conversations with farmers, especially those who produce fruits and vegetables for the fresh market. These farmers point out that the current system works well for some farmers—those farmers who grow their crops as monocultures in large tracts, who grow one or a small number of crops, who plant and harvest a particular crop all at once each year, and who market their crops as undifferentiated commodities, often by delivering them to a local grain elevator. The farmers note that the infrastructure is in place to make measuring and recording the acreage planted and yield harvested by these farmers relatively smooth and easy. Many features of the recordkeeping system which work well for commodity farmers may need adaptation in order to work equally well for fruit and vegetable farmers.

A. Case Study: Challenges with Recordkeeping and Reporting for Hmong Farmers in Dakota County, Minnesota

Several dozen Hmong vegetable, fruit, and flower farmers lost crops as a result of a 2008 tornado and hail storm in Dakota County, Minnesota. Most had never participated in an FSA program before, despite having farmed and sold at local

¹⁰⁰ 7 C.F.R. §§ 760.621, 760.631, and 760.632 (2010).

farmers' markets for years or even decades. They understood they were too late to receive crop insurance or NAP benefits for 2008 if they were not already enrolled in those programs, but they hoped to become eligible for SURE, and to begin to establish an Actual Production History for the future. Many of the affected farmers filed or attempted to file acreage reports in 2008 for the first time.

While the state and local FSA offices made a genuine effort to work with the farmers, the infrastructure to make the programs work efficiently and effectively for these farmers was not in place. Moreover, the procedures for determining whether to designate a federal disaster area did not seem easy to apply in a county with both conventional and highly diversified farms.¹⁰¹ For example, in the initial assessment of the disaster, regulations direct FSA to assess the damage based upon information obtained from personal knowledge and from farmers and agricultural and community leaders, and from any other personally contacted reliable sources.¹⁰² This step is to be taken in the first two days following a natural disaster, which places an emphasis upon evaluation of farms previously known to FSA, and farmers who are already participating in FSA programs. It is easy for fruit and vegetable farmers to be overlooked. Though the regulations allow some flexibility for USDA to declare a disaster, in practice FSA requires that there have been at least a 30 percent loss to a "major crop," but does not clearly define what constitutes a "major crop."¹⁰³

Most of the farmers noted that they rent their farmland, often farming different tracts from year to year. They rent farmland in one-, two-, four-, six-, or ten-acre parcels; whatever they can find that is tillable but not already planted in corn or soybeans or enrolled in DCP or CRP and thus not permitted to be planted in fruits and vegetables. Almost all of the affected Hmong farmers sell at local farmers' markets. They tend to grow anywhere from 10 to 40 or more crops. Many crops are planted not once per season, but as often as once per week. Planting for fall crops routinely takes place after the acreage reporting date. Adjustments may be made to a farmer's intended planting schedule due to vagaries of the weather and availability of seeds and other factors.

1. Acreage Reporting Form

The acreage reporting form posed many challenges for the farmers. As tenants renting small acreages, they feel they have little option other than to rely upon a landowner's word as to size of the acreage rented. The acreage reporting form had space for fewer than ten crops, yet most members of this group of farmers plant

¹⁰¹ 7 C.F.R. pt. 1945, subpt. A (2010).

¹⁰² 7 C.F.R. § 1945.19(c)(2) (2010).

¹⁰³ Compare 7 C.F.R. § 1945.6(c) (2010) (defining "natural disaster").

several times that many crops. The form did not provide an easy means to report successive planting dates for the same crop. It did not provide instruction on how to record the same or different crops planted on the same land, whether simultaneously or in succession. Neither the form nor the accompanying instructions provided an easy means to report crops grown in row-feet or fractions of an acre, nor did it explain how to convert row-feet to acres, or vice-versa. Many of the crops or crop varieties these farmers grow cannot be found on the tables in the NAP Handbook, either because: (1) the table simply uses a broad category such as “greens” or “other lettuce”; or (2) the farmer does not know the name of the crop in English; or (3) even relatively common Hmong specialties or other specialty varieties are simply absent from the table. Ultimately, FSA county office employees sought approval for changes to the form, to make it more user-friendly for the farmers and the agency. The time spent by each farmer and the FSA staff in completing a single acreage report was substantial. The SURE rule also requires acreage reporting, and accepts reports of double-cropping and multiple cropping only if acceptable under NAP rules.¹⁰⁴

2. Production Reporting

The Association for the Advancement of Hmong Women in Minnesota (AAHWM) hosted a workshop in Saint Paul in February 2009 with many of the affected farmers from Dakota County to discuss production reporting for 2008 and applying for 2009 programs. FSA county employees, FSA state outreach staff, state legal aid staff, and staff from Farmers’ Legal Action Group all participated in the workshop. Even farmers who keep farm records reacted with dismay as they learned about the production records required in order to participate in disaster assistance programs. Many of these concerns would arise for most farmers using similar farming and marketing methods, whether or not they were members of a socially disadvantaged racial or ethnic group.

The farmers explained the challenges they face in attempting to gather this data. As vendors selling at farmers’ markets, there is a premium on freshness. Farmers selling at early-morning markets may be picking and packing their crops until well into the night on the night before the market, and rising before the market to finish picking, load the truck, drive to the market, and set up. Farmers selling at afternoon markets may delay some picking until that morning, to get that “just picked” freshness. As a consequence of this deliberate last-minute timing, it is difficult for farmers to contemplate extra steps such as individually measuring and recording the yield of each of their many crops.

¹⁰⁴ 7 C.F.R. § 760.632 (2010).

One farmer asked if he could cover just his most important crops. At that point, Congress had passed a *de minimis* exception for SURE, but none of the presenters could say with any confidence what crops would be considered not to be crops of economic significance under SURE.¹⁰⁵ There was some discussion of whether a farmer could obtain a scale and weigh the crops as they were being loaded in a truck, and whether those records would be considered acceptable by USDA. And there was discussion of whether it made sense to report yields in pounds for crops such as flowers, when the most meaningful unit of measure for flowers is in terms of numbers of stems.

The SURE regulations published in December 2009 provide some answers to these questions. In general, a farmer must provide verifiable or reliable production records.¹⁰⁶ Verifiable records are those which can be confirmed by an independent source.¹⁰⁷ Verifiable records are most readily produced by farmers selling to third parties at wholesale. Reliable production records are records deemed adequate to substantiate the amount of production, often because they are contemporaneous records created by the farmer, despite the lack of confirmation by a third party.

3. Lack of Interpretation Services

Many of the Hmong farmers have limited English proficiency; they speak some English, and understand more than they speak, but many are not fluent and represent varying degrees of literacy. Yet with their family's incomes and government assistance at stake, the farmers wanted to be sure that they understood every detail. Arranging for interpreters to be present when a farmer went to fill out an acreage reporting form was itself a substantial barrier. Some farmers needed to arrange for an English-speaking relative, friend, or representative from a nonprofit organization to call FSA to schedule the appointment for them and request an interpreter. In many cases, staff of nonprofit organizations who had accompanied farmers in order to act as their advocates also had to act as their interpreters.

At the Fourth Annual Minority and Immigrant Farming Conference, held in Saint Paul, Minnesota, in March 2009, a number of older Hmong farmers shared their regret at having never had the opportunity to learn to read and write. Neither the

¹⁰⁵ The SURE regulations define the *de minimis* exception as applying to crops that are not economically significant, which it defines as a crop that contributed, would have contributed, or is expected to contribute 5 percent of the total expected revenue from all of a participant's crops on a farm. 7 C.F.R. § 760.602, "Crop of economic significance" (2010). See also, 7 C.F.R. § 760.613 (2010).

¹⁰⁶ 7 C.F.R. § 760.637 (2010).

¹⁰⁷ 7 C.F.R. § 760.602, "Verifiable production records" (2010).

local nor state FSA offices appear to have the resources or language and cultural skills to provide technical assistance to help these farmers fill out the required reports. Yet Hmong farmers comprise about half of the vendors at the very successful Saint Paul Farmers' Market. Obtaining equal access to federal programs is an issue for many immigrant farmers with limited English proficiency around the country. Improving systems to address these needs is critical to ensuring that USDA provides equal access to its programs to all farmers.

B. Create or Adapt Acreage and Production Reporting Forms for Diversified Producers of Fruits and Vegetables, Including Direct Marketers

Farmers who are provided with standardized forms which are applicable to their operations are much more likely to maintain the required records, and to do so thoroughly and accurately. FCIC published a request for applications for non-insurance risk management program partnerships in 2007.¹⁰⁸ The request included as an example of tools that might be developed under a risk management program partnership, "Tools that assist producers in constructing and maintaining a farm records system required to participate in the insurance program, e.g., development of a software package for producers who sell through Community Supported Agriculture (CSA) programs and direct markets." It is not clear whether a partnership was actually awarded to develop such a tool. We urge FSA to cooperate with RMA to develop forms and/or software programs to meet this need, and to widely publicize any such products that have been or are developed.

C. Standards for Acceptable Production Evidence Need Adaptation to Accommodate the Production and Marketing Methods of Many Fruit and Vegetable Farmers, Such as Farmers' Market Vendors

The statute governing NAP provides that, "To be eligible for assistance under this section, a producer shall provide annually to the Secretary records of crop acreage, acreage yields, and production for each crop, as required by the Secretary."¹⁰⁹ The statute further provides that, "A producer shall provide annual reports on acreage planted or prevented from being planted, as required by the Secretary, by the designated acreage reporting date for the crop and location as established by the Secretary."¹¹⁰ This statutory language gives USDA substantial discretion to promulgate appropriate regulations with respect to recordkeeping and reporting in the NAP program.

¹⁰⁸ 72 Fed. Reg. 15,644 (2007). Authority for the request is found at 7 U.S.C. § 1522(d).

¹⁰⁹ 7 U.S.C. § 7333(b)(2).

¹¹⁰ 7 U.S.C. § 7333(b)(3).

The clarity of the NAP regulations addressing a farmer's responsibility to provide records of production could use improvement. For example, the regulation sets forth different record requirements for crops disposed of through "commercial channels" and those disposed of "other than through commercial channels," but does not define these terms.¹¹¹ The NAP regulation would also be improved by setting forth criteria for when an appraisal is required; the current regulation simply states that FSA may determine an appraisal is necessary, and that producers of hand-harvested crops may request and pay for an appraisal during non-loss crop years.¹¹² One practical challenge, for farmers' market vendors and other fruit and vegetable farmers, is that there may not be one suitable time in the season to conduct an appraisal and capture all of the value on the land, because of the use of succession plantings.

To some extent, FSA has tried to use handbooks to fill in the gaps in the NAP regulations relating to reporting and recordkeeping obligations. The handbook has long appeared to narrow the range of acceptable records to records that can be verified by an independent party, though it was amended in 2008 to allow corroboration of production evidence by comparison to production on neighboring farms.¹¹³ We urge FSA to promulgate clearer, more detailed regulations through notice and comment rulemaking. The regulations should set forth the agency's expectations for reliable records to be used by farmers' market vendors, such as contemporaneous measurements and diaries.

D. Defining Crops of Economic Significance at the 5 Percent Level Poses Significant Burdens on Farmers and FSA Alike

The situation of the Hmong farmers in Dakota County, Minnesota, demonstrates some of the challenges that can be foreseen because FSA has defined a crop of economic significance as any crop that has contributed or is expected to contribute 5 percent or more of the total value of crops on the farm.¹¹⁴ For farmers growing many crops on the farm, whether that is 30 crops or 60 crops, it may be difficult to anticipate which crops will cross the 5 percent threshold. This would suggest that farmers should be prepared to include even crops that may end up well under the 5 percent threshold. But this greatly increases the recordkeeping burden for farmers, who may simply elect not to participate at all, rather than be required to obtain crop insurance or NAP coverage on 20 or more crops.

¹¹¹ 7 C.F.R. § 1437.7(a)(1), (2) (2010).

¹¹² 7 C.F.R. § 1437.7(b)(1) (2010).

¹¹³ NAP Handbook, para. 322E, Step 8, page 6-6 (June 12, 2008).

¹¹⁴ 7 C.F.R. §§ 760.602, "Crop of economic significance" and 760.613 (2010).

The term “crop of economic significance” is not defined in the statute governing supplemental agricultural disaster assistance.¹¹⁵ However, “crop of economic significance” has a statutory definition for purposes of crop insurance. That definition is “a crop that has contributed, or is expected to contribute, 10 percent or more of the total expected value of all crops grown by the producer.”¹¹⁶ The statute for supplemental agricultural disaster assistance calls for a “uniform meaning” to be given to the term “crop of economic significance.” In the absence of a specific Congressional direction to adopt a new meaning of the term, and in the presence of an affirmative direction to apply a uniform meaning, USDA should assume that Congress intended the existing statutory definition for ‘crop of economic significance’ to apply. It would be appropriate for “crop of economic significance” to have the same meaning for purposes of the SURE program as for crop insurance, because its purpose in both contexts is similar: to determine the crops for which a farmer must obtain coverage in order to participate in other federal programs.

One could argue that because NAP fees are capped at \$750 per county, no matter how many crops are covered, there is no direct additional financial burden upon the farmer for covering 20 crops. This is true. But there is a significant administrative burden if the farmer must file production reports for a large number of minor crops, and risk being found ineligible for SURE coverage on the major crops due to failure to cover a minor crop that is more productive than anticipated. A 10 percent threshold would be easier for farmers to measure and anticipate, and for FSA to measure and enforce. Farmers should have the option, but not the obligation, to include crops that contribute less than 10 percent of farm revenue.

The reasons to prefer a 10 percent definition for crops of economic significance include the following:

- Prevent confusion among farmers and crop insurance providers by maintaining a consistent standard for when crop insurance is required in order to ensure eligibility for other federal programs, from FSA loan programs to SURE.
- Promote equity by using a consistent standard for crops of economic significance, without regard to whether it is crop insurance or NAP coverage that must be obtained.
- Increase participation and relieve the administrative burden on the agency as well as farmers by not imposing SURE recordkeeping burdens on farmers for

¹¹⁵ 7 U.S.C. § 1531(a)(6).

¹¹⁶ 7 U.S.C. § 1508(b)(7)(B).

crops that produce between 5 and 10 percent of total expected value of crops on a farm. Diversified farmers may have numerous crops that fall in this category and should be granted the discretion to decide whether to include these crops in the SURE program guarantee, rather than being forced out of the program if they do not wish to cover all minor crops.

- Absence of a compelling reason to depart from the 10 percent standard.

To require farmers to report on all crops that do or are expected to contribute 5 percent or more of total crop value is to hold farmers to a higher standard of precision than USDA has held itself. Local FSA offices appear to have regarded as unimportant the difference (including the difference in price) between mustard greens and arugula, or between plantains and Thai bananas.¹¹⁷

The less burdensome and more fair approach—particularly while both farmers and FSA are learning the program and continuing to contribute to the data on fruits, vegetables, and other specialty crops—would be to interpret the definition of “crop of economic significance” as being at the 10 percent level.

E. Consider Creating a “Low Documentation” Option under NAP

Congress has directed FCIC to minimize the paperwork required and the complexity and costs of procedures governing the application, processing, and servicing of catastrophic risk protection plans, to the maximum extent practicable.¹¹⁸ Congress has also directed that FSA should provide coverage equivalent to catastrophic crop insurance coverage through NAP.¹¹⁹

We urge FSA to consider creating a “low documentation” option under NAP, similar to the “low documentation” requirements for relatively small operating loans in the FSA direct loan programs.¹²⁰ This option could take one of several forms. It might be made available for: (1) crops expected to produce less than a specified dollar amount—perhaps \$1,000; (2) crops expected to produce less than 10 percent of the farmer’s income; (3) all crops produced by farmers expected to

¹¹⁷ See NAD Director Determination No. 2008E000455 (Oct. 22, 2008) (FSA price for mustard greens \$.39 per pound, Chicago AMS price for arugula \$6.50 per pound); NAD Director Determination No. 2009S000380 (Aug. 12, 2009) (FSA paid NAP benefits for plantains of \$29,597, but benefits for actual crop of Thai bananas should have been \$43,824).

¹¹⁸ 7 U.S.C. § 1508(b)(10).

¹¹⁹ 7 U.S.C. § 7333(a).

¹²⁰ See 7 C.F.R. § 764.51(c) (2010).

have less than a specified gross revenue from agricultural products—perhaps \$50,000; or (4) all crops produced by limited resource farmers.

IX. PROVIDING FAIR AND EQUITABLE COVERAGE TO FARMERS NOT PARTICIPATING IN YIELD-BASED CROP INSURANCE OR NAP

To this point, this report has largely concerned itself with improved collection of data regarding crop prices and yields, and with improved recordkeeping and reporting systems. Given the statutory design of SURE, and its reliance upon the existing crop insurance and NAP programs, those are the improvements that would do most to improve the equity and efficiency of these programs. That is, in a program where benefits are based upon historical prices and yields for specific crops, it is critical to develop systems able to achieve precision and to distinguish between Thai bananas and plantains, between Niagara grapes and table grapes, between mustard greens and arugula. Yet, to consider the resources necessary to gather, submit, receive, and analyze this data is to find oneself asking at what point the drive for data reaches the point of diminishing returns—at what point does more data not result in a more equitable and efficient program?

Congress has directed USDA to provide SURE assistance in at least three situations where farmers are not participating in yield-based crop insurance or NAP. These situations include:

- **Buy-in coverage:** Farmers who had not enrolled in crop insurance or NAP for 2008 but who paid the buy-in fee and met all other applicable requirements are eligible to receive SURE assistance for the 2008 crop year as if they had obtained crop insurance or NAP coverage (with some adjustments).
- **Waiver for socially disadvantaged, limited resource, and beginning farmers or ranchers:** Farmers who qualify as socially disadvantaged, limited resource, or beginning farmers are not required to meet the Risk Management Purchase Requirement and will be eligible for SURE benefits at a level determined by FSA to be equitable and appropriate.
- **Non-yield based policies and plans of insurance:** Farmers who obtain non-yield based crop insurance, such as the Adjusted Gross Revenue-Lite program, are to receive equitable treatment in SURE. AGR-Lite is a whole farm revenue crop insurance product. That is, it insures overall farm revenue, rather than prices or yields of individual crops. Whole farm revenue insurance is a promising approach for fruit and vegetable farmers, especially those who are direct marketing, using organic farming practices, or selling

value-added products. One challenge with many of the newer revenue-based insurance products will be to streamline the documentation requirements.

Crop insurance is premised on history. Yet in the three situations described above, the farmers may not possess detailed records of acreage, yields, and prices in previous years. It will be a challenge for FSA to provide SURE benefits as if the farmers did have that data, or to determine the SURE benefits the farmer would have received had the farmer had crop insurance or NAP coverage.

The statutory directive to provide equitable and appropriate coverage for socially disadvantaged, limited resource, and beginning farmers is not an aberration. Congress similarly directed FCIC to develop an adjusted gross revenue crop insurance plan for beginning farmers, who may not have the five years of farm income tax records which are typically required, whether because they have not been in operation for five years or because their records do not meet all requirements of the Adjusted Gross Revenue (AGR) policy.¹²¹ Congress is clearly prepared to sacrifice some actuarial certainty in order to achieve other policy goals.

The SURE regulations state that participants who do not have a SURE yield established—based upon acreage reports and verifiable or reliable production records—will have a yield determined for them by FSA.¹²² Farmers who have not met the Risk Management Purchase Requirement, but who are eligible to participate in SURE under the waiver of that requirement, will receive a weighted yield determined at 65 percent of the county expected yield for each crop or the weighted counter-cyclical yield.¹²³ Of course, only commodity crops eligible for the Direct and Counter-Cyclical Program under the commodities title have a counter-cyclical yield; so this option to establish a higher SURE yield is yet another way that the SURE regulations provide more options for farmers who produce commodity crops than for specialty crop farmers.

One intriguing option for calculating crop production losses for farmers who do not have acceptable evidence of yields is the maximum average loss level to determine the farmer's crop production losses.¹²⁴ Maximum average loss level is defined as

the maximum level of crop loss that will be used in calculating SURE payments for a participant without reliable or verifiable

¹²¹ 7 U.S.C. § 1522(c)(15).

¹²² 7 C.F.R. § 760.631(e)(2010).

¹²³ 7 C.F.R. § 760.638(d)(1) (2010).

¹²⁴ 7 C.F.R. § 760.637(e)(2) and (l) (2010).

production records as defined in this section. Loss levels are expressed in either a percent of loss or a yield per acre, and reflect the amount of production that a participant should have produced considering the eligible disaster conditions in the area or county, as determined by the FSA county committee in accordance with instructions issued by the Deputy Administrator.¹²⁵

This “maximum average loss level” concept seems promising, in that it allows FSA to use reasonable estimates of what the farmer might have lost. The challenge, of course, is devising guidelines to ensure that the estimates are truly reasonable, particularly for specialty crops.

Perhaps the reliance upon historical records (whether the farmer’s own or those farmers who are similar in location, crop or crop variety, or production or marketing methods) is not the only way to measure expected production and actual losses. Perhaps FSA already has or will develop a novel approach to this new directive from Congress. If FSA has not, we urge the agency to solicit suggestions and comments from the public on how it might balance simplicity and fairness, and protect against fraud at the same time. The pilot project process has helped to nurture innovative approaches in the past, such as Adjusted Gross Revenue (AGR) and Adjusted Gross Revenue–Lite (AGR-Lite), as well as the Pasture, Rangeland, and Forage crop insurance product.

It seems that SURE benefits which are not based upon production history established under crop insurance and NAP may well need to consider a variety of approaches—actual yields and prices (including self-certified ones); county expected yields and prices; revenue losses; losses determined upon the basis of appraisals; and creative new approaches.

This brings us full circle, to urging that FSA allow for public participation in the development of the SURE program. The foregoing discussion demonstrates some of the complexity of the SURE program and should highlight the need for public input to ensure that the program maximizes its contributions to both efficiency and equity in its delivery of disaster assistance. If it is to provide equitable assistance for all farmers affected by natural disaster, FSA must consider the specific needs of historically underserved producers, including beginning farmers, socially disadvantaged farmers, limited resource farmers, specialty crop farmers, organic farmers, and small- and mid-sized farms, and modify programs in order to address the specific needs of these farmers.

¹²⁵ 7 C.F.R. § 760.602, “Maximum average loss level” (2010).

X. PROVIDE PROCESSES THAT ARE PARTICIPATORY, TRANSPARENT, AND FAIR FOR THE DEVELOPMENT AND IMPLEMENTATION OF SUPPLEMENTAL DISASTER ASSISTANCE PROGRAMS

While the substantive rules of disaster assistance programs are important, the processes by which disaster assistance programs are implemented are no less important. For many years, Congress has authorized, and USDA has implemented, a variety of ad hoc disaster assistance programs without the benefit of notice-and-comment rulemaking. The result has been disaster assistance programs that did not provide an adequate safety net because they: (1) erected and maintained unnecessary barriers to participation, especially for specialty crop farmers, socially disadvantaged farmers, limited resource farmers, and beginning farmers; and (2) failed to base program benefits on the actual prices received by fruit and vegetable farmers, organic farmers, and value-added producers.¹²⁶ Farmers and farm organizations have been frustrated by the lack of opportunity to challenge inaccurate data and to offer suggestions to make the programs more effective, efficient, and equitable. Many farmers have been forced to seek recourse in administrative appeals or the federal courts as a result, or have simply opted out of the programs.

After passage of the 2008 Farm Bill, Congress addressed rulemaking requirements for the new standing disaster assistance programs in the Disaster Relief and Recovery Supplemental Appropriations Act of 2008.¹²⁷ In that Act, Congress authorized the Secretary to promulgate regulations for the new standing disaster assistance programs, including SURE, without regard for the generally applicable requirements for notice and comment rulemaking under the Administrative Procedures Act. USDA published a final rule addressing the Livestock Indemnity Program and general provisions for a number of the standing disaster assistance programs on July 2, 2009, and for SURE on December 28, 2009.¹²⁸ Both rules would be improved by notice and comment rulemaking, and each rule should be amended to correct errors.

¹²⁶ See generally, Marlow, “Disaster Programs and the Changing Face of Agriculture in North Carolina,” RAFI-USA (2007), available at <http://www.rafiusa.org/programs/disastersummary.html>; Krueger, “Disaster Readiness and Recovery: Legal Considerations for Organic Farmers,” FLAG (2007), available at <http://www.flaginc.org/topics/pubs/arts/OrganicDisaster2007.pdf>.

¹²⁷ Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009 Pub. L. No. 110-329, Div. B, Title I, § 10102, 122 Stat. 3585 (Sept. 30, 2008).

¹²⁸ 74 Fed. Reg. 68,480 (2009) (codified at 7 C.F.R. §§ 760.601 et seq.); see also, 74 Fed. Reg. 31,567 (2009) (codified at 7 C.F.R. §§ 760.101 et seq.) (setting forth general provisions for permanent disaster programs authorized in the 2008 Farm Bill).

A. Provide for Public Participation in Development of USDA Program Regulations

Secretary Vilsack has committed to approaching issues with greater transparency and involvement of the full diversity of stakeholders served by USDA.¹²⁹ Full notice and comment rulemaking should be a priority for the disaster assistance title (and most if not all other titles) of the next Farm Bill. In general, notice and comment rulemaking enables the public to weigh in on proposed regulations before they are adopted by a government agency. In cases where time is of the essence, an agency may publish an interim final rule, in order to balance the needs for prompt implementation of a program and for public comment on program regulations. Frequently, though, Congress has forestalled even this abbreviated form of rulemaking in the context of disaster assistance programs, and directed that rules be published as final, with no opportunity for public input.¹³⁰ Until passage of the Supplemental Appropriations Act reversed the decision, the 2008 Farm Bill had taken a desirable turn toward greater public involvement, simply by not exempting the standing disaster programs from notice and comment requirements.

The fact that USDA need not go through notice and comment rulemaking does not mean that it must not. That is, USDA is not prohibited from engaging in notice and comment rulemaking related to the standing disaster assistance programs authorized in the Farm Bill. Arguably, USDA would have been free to promulgate SURE regulations, and to allow for public participation by publishing the regulations as an interim final rule. By publishing the SURE regulations as an interim final rule, USDA could have signaled its commitment to greater transparency and involvement, without delaying implementation. Though USDA did not publish the SURE regulations as an interim final rule in the first instance, we recommend that USDA publish a proposed rule in 2010 to solicit comments and make needed changes to the SURE regulations and to the general provisions for the standing disaster assistance programs, based upon its experience in implementing the programs.

¹²⁹ “Statement by Thomas Vilsack, Secretary of Agriculture, Before the Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, Committee on Appropriations, U.S. House of Representatives,” USDA Press Release No. 0077.09 (Mar. 31, 2009).

¹³⁰ For example, see the Disaster Relief and Recovery Supplemental Appropriations Act of 2008, Pub. L. No. 110-329, Div. B, Title I, § 10102, 122 Stat. 3574 (Sept. 30, 2008).

B. Ownership Not a Requirement for Permanent Disaster Assistance Programs

1. General Rules for Permanent Disaster Assistance Programs

The statute governing the supplemental agricultural disaster assistance programs does not require that a farmer or eligible producer own the farm or own the crops. The statute defines an “eligible producer on a farm” as an individual or entity that, as determined by the Secretary, assumes the production and market risks associated with the agricultural production of crops or livestock.¹³¹ The general provisions for the permanent disaster programs provide for eligibility for individuals or entities who assume risks either as: (1) the owner of the farm, when there is no contract grower; or (2) a contract grower of the livestock when there is a contract grower.¹³²

The definition creates a large gap in which farmers who rent land and are farm operators, but not farm owners, would not qualify as “eligible producers.” Tenant farmers are a growing segment of the farming population, particularly among beginning farmers, limited resource farmers, and socially disadvantaged farmers. It is critical that the definition of “eligible producer” be changed; it would unreasonably exclude large numbers of otherwise eligible farmers, since farm ownership is not an essential element for a farmer to assume the risk of agricultural production.

The current definition of “eligible producer” allows for the possibility of contract growers of livestock.¹³³ However, the rule assumes that only producers of livestock may be contract growers.¹³⁴ Recently, a number of vegetable farmers have been denied disaster assistance program benefits because they had entered into contracts with processors that described them as bailees, and not owners, of the crops.¹³⁵

¹³¹ 7 U.S.C. § 1531(a)(8).

¹³² 7 C.F.R. § 760.103(a) (2010).

¹³³ 7 C.F.R. § 760.103(a) (2010).

¹³⁴ 7 C.F.R. § 760.103 (2010). Ironically, contract growers, whether of crops or livestock, often do own the farm, but not the crops or livestock, so that the requirement that a producer be an “owner of the farm, when there is no contract grower, or a contract grower of the livestock when there is a contract grower” would make little sense for producers who are both owners of the farm and contract growers.

¹³⁵ See for example, NAD Determinations 2008E000678 (snap beans) (Mar. 5, 2009); 2008W000004 (sugar snap peas) (June 18, 2009); 2009W000040 (sweet corn) (July 7, 2009); and 2009W000132 (green peas and sweet corn) (July 7, 2009). The 2007 Census

If contract growers of livestock are deemed to assume the production and market risks within the meaning of 7 U.S.C. § 1531, it seems logical that farmers characterized as contract growers of vegetables also should be deemed to assume the risk. Further, in the absence of a statutory requirement of ownership, it is hard to understand why farm operators should be excluded from the definition of producers eligible to participate in SURE. FSA should publish an amendment to the regulation to remove the ownership requirement.

2. Specific Rules for SURE

The rules for SURE also require a farmer to have an “ownership share” of the crop in order to participate in SURE.¹³⁶ They state that a contract that precludes the farmer from having an ownership share renders the farmer ineligible for payments under this program. FSA has no statutory authority for imposing this requirement on either SURE or any of the other permanent disaster programs, and it should be removed from the regulations.

C. Reaffirm NAD’s Authority

The National Appeals Division (NAD) within USDA has authority to decide appeals under programs such as NAP and SURE. Appeals are of special importance for fruit and vegetable farmers, whose local USDA officials, due to limited experience working with fruit and vegetable operations, may not properly account for the unique character of these types of farms.

1. Appealability

The July 2, 2009, final rule setting out general provisions for the supplemental agricultural disaster assistance programs created by the 2008 Farm Bill includes a section setting out a list of agency determinations that FSA asserts are not subject to administrative review or appeal.¹³⁷ Such provisions have become commonplace in the regulations for ad hoc disaster programs administered by FSA. While an FSA employee or committee may make an initial determination as to whether appeal rights apply, final authority to determine the appealability of any agency action or inaction rests with NAD, not FSA. The NAD Director has authority to determine whether a decision is adverse to an individual participant and is thus

of Agriculture found about 2,500 farmers grew vegetables, melons, potatoes, grains, or oilseed under production contracts. 2007 Census of Agriculture, Table 41.

¹³⁶ 7 C.F.R. § 760.610(a)(6), (b) (2010).

¹³⁷ 7 C.F.R. § 760.110(a) (2010). See also, 7 C.F.R. § 760.102(e) (2010).

appealable, or whether it is a matter of general applicability and is thus not subject to appeal.¹³⁸

Not surprisingly, the NAD Director has made numerous determinations regarding appealability, in which the Director has taken a more expansive view of appealability than FSA. For example, the Director routinely finds that “actions such as general yield rates are not adverse to an individual participant until the action results in an adverse decision on an application by an individual participant.”¹³⁹ In one case, the NAD Director stated,

It was the manner in which the FSA allegedly implemented its regulation, not the regulation itself or the DAFP’s authority to set the price, which the Appellant challenged. Moreover...resolution of this issue directly affects NAP payments for which the Appellant is eligible. If FSA failed to follow its regulations in establishing the price, the consistent application of that erroneous outcome to other participants would not render it lawful.¹⁴⁰

In another case, the NAD Director stated,

Appellant’s main basis for his appeal to NAD is that, in determining the amount of payments made to him as a participant in an agency program, [] FSA erred in calculating the average market price and the payment factors under its regulations that it then generally applied. Resolution of the issues Appellant raises in this case, i.e., the proper price and unharvested factors of his 2007 NAP crops, directly affects the amount of payments Appellant is eligible to receive. These issues are not a matter of general applicability but affect Appellant as an individual participant and constitute the basis for the adverse decision.¹⁴¹

The distinction that the NAD Director has drawn is relatively straightforward. NAD will not hear challenges to regulations, nor to the existence of FSA’s authority to set prices and the like. But NAD will recognize as appealable challenges to prices, yield rates, payment factors, etc., provided those standards have been applied to the individual bringing the appeal. NAD will take jurisdiction over appeals that challenge the factual basis for FSA standards, their derivation, their application, and their implementation.

¹³⁸ 7 U.S.C. § 6992(d).

¹³⁹ NAD Determination No. 2008S000071 (Apr. 17, 2008).

¹⁴⁰ NAD Determination No. 2004W000899 (Jan. 13, 2005).

¹⁴¹ NAD Determination No. 2008E000455 (Oct. 22, 2008).

The farmers who brought the above cases, and others like them who sought review of FSA's initial statements on appealability, were able to have their cases heard. The current rule for the new supplemental agricultural disaster programs will result in different outcomes for similarly situated farmers, based on nothing more than whether or not they know of or obtain advice regarding their right to seek review of FSA's statement about appealability. The inequitable outcomes are created entirely by FSA's superfluous statement on appealability. FSA should revise its regulations to simply refrain from comment on whether a particular decision is appealable.

2. The Problem of the “Revolving Door”

NAD has statutory authority to determine appealability and to review FSA decisions, and to require implementation of its determinations. Despite NAD's statutory authority, farmers are sometimes subjected to a “revolving door” between FSA and NAD in the search for a fair resolution to their concerns. This revolving door was in operation in a number of NAD decisions where the farmer was forced to make several trips between FSA, the NAD Hearing Officer, and the NAD Director before the problem was resolved.¹⁴²

This dynamic erodes farmer confidence in USDA and depresses farmer participation in USDA programs, including surveys and data collection efforts. The corrosive effect extends well beyond the individual farmer involved in each appeal. The law already requires prompt and full implementation of NAD decisions.¹⁴³ Repeated, systemic failure to implement NAD decisions led to a new requirement in the 2008 Farm Bill that USDA agencies whose decisions are subject to review by NAD must report on implementation of NAD decisions.¹⁴⁴ A tone should be set at the highest levels of USDA in which the role of each agency within USDA is respected, including the role of NAD.

XI. RECOMMENDATIONS FOR POLICY CHANGES RELATED TO CROP INSURANCE AND DISASTER ASSISTANCE PROGRAMS

This section pulls together the various recommendations for policy changes discussed throughout this chapter.

¹⁴² For example, NAD Case No. 2007E000838 (NAD Director Determination Feb. 4, 2008) and NAD Case No. 2006S000387 (NAD Director Determination Jan. 23, 2007).

¹⁴³ 7 U.S.C. § 7000.

¹⁴⁴ 2008 Farm Bill § 14009 (codified at 7 U.S.C. § 7000(b)(1)).

- **Provide Non-insured Crop Disaster Assistance Program coverage equivalent to that provided by catastrophic crop insurance.** USDA should ensure that disaster assistance coverage provided for fruits, vegetables, and other specialty crops is equivalent to that provided for conventional commodity crops. Catastrophic crop insurance coverage protects up to 27.5 percent of expected income, based upon losses greater than 50 percent of expected yields at 55 percent of the expected price. Equivalent coverage for fruit and vegetable crops may require that FSA recognize different prices for farmers who direct market or sell at retail, organic farmers, and other value-added producers.

Determine needed changes to the Non-insured Crop Disaster Assistance Program (NAP) regulations so that NAP provides coverage equivalent to crop insurance at the catastrophic level. USDA or the Government Accountability Office should produce a report in 2010 and every two years thereafter detailing progress in expanding crop insurance coverage and disaster assistance protection for specialty crops in order to achieve the statutory mandate of providing equivalent coverage under NAP, as is provided by catastrophic crop insurance policies.

- **Make effective coverage in addition to catastrophic coverage available to fruit and vegetable farmers.** Congress should create additional coverage levels under NAP, for crops and/or diversified operations, where the Federal Crop Insurance Corporation may lack the actuarial data required for a permanent crop insurance policy. The additional coverage could be for an increased percentage of the average market price, an increased percentage of the approved yield, or both. This additional coverage could be used to create a more attractive NAP product than the coverage currently offered and as a means to increase farmer participation, and thus, to improve collection of price and yield data and ultimately advance the possibility of additional crop insurance policies.
- **Continue to develop and refine whole farm revenue crop insurance products.** Streamline the documentation requirements for these policies.
- **Collect and use price and yield data for specialty crops.** The central mechanism by which crop insurance and disaster assistance programs discourage fruit and vegetable production is in their reliance upon price yields that do not correspond to the prices actually received by most fruit and vegetable farmers. There are several specific policy changes USDA should undertake to eliminate this barrier to full disaster coverage for fruit and vegetable production

- **Collect and use data by crop, type, variety, and intended use.** Direct USDA to develop and incorporate into program regulations criteria to identify distinct crops, types, varieties, and intended uses, encompassing both production and marketing practices, and to determine the “best available information” regarding price and yield. To the extent that price and yield information collected and submitted by farmers is available to FSA with a reasonable effort, consider the data submitted by farmers under the same criteria as data collected by FSA. Create a means for farmers’ market managers to report average prices at their markets.

Recognize direct marketing as a distinct intended use with significantly different prices. Base benefits for crops sold through direct marketing upon retail prices, not wholesale. Recognize the certified organic market as a distinct intended use with significantly different prices. Make completion of (and full funding for) the Organic Production and Market Data Collection Initiative a high priority.

Include full funding for comprehensive data collection (retail and wholesale, conventional and organic) in USDA budgets and appropriations requests

- **Consider best sources of relevant price and yield data.** Require USDA to make a reasonable effort to locate price and yield data available from federal and state government sources, universities, Extension, buyers and processors, local markets, and farmers’ markets before deciding on individual benefits. Compare the costs and benefits of having “best available information” collected at the local level versus at the national level.

For yield data, establish criteria which recognize that the “most representative available historical information” is the data that most closely matches the farmer’s production and marketing practices.

Request public input on the most efficient, effective, and equitable ways to collect accurate price and yield data for fruits and vegetables.

Actively solicit price and yield data from specialty crop farmers when they sign up for disaster assistance programs. Permit a farmer to

document his or her price history for a crop and receive coverage based on that history.¹⁴⁵

- **Update reporting and recordkeeping requirements.** Recommendations for policy change that address this issue include:
 - **Adapt reporting forms.** Adapt acreage, production, and price reporting forms to accommodate fruit and vegetable crop farms, including highly diversified farms. Solicit input from state and local FSA offices and from farmers regarding crops, types, varieties, and intended uses that should be added to the NAP tables. Create an acreage reporting form that will streamline reporting by farmers who utilize succession planting and who grow dozens of crops on relatively small acreage.
 - **Amend the definition of a crop of economic significance.** For purposes of the Risk Management Purchase Requirement under the Supplemental Revenue Assistance Program (SURE), amend the definition of a “crop of economic significance” to mean crops that do or are expected to contribute 10 percent or more of total crop value, in order to avoid unduly burdening highly diversified farmers who may have many crops at or near the current 5 percent threshold.
 - **Adopt clear regulatory standards for acceptable production evidence.** Clarify or abandon the distinction regarding sale through commercial and noncommercial channels under the NAP and SURE regulations. Clarify criteria by which production evidence will be determined “reliable” in the absence of independent verification. Review and clarify crop appraisal requirements.
 - **Review criteria for disaster designations that trigger eligibility for SURE and Emergency Loans.** Adopt and publicize regulations that instruct state and local FSA offices to consider whether a disaster designation may be warranted when there is significant damage to many small-scale and highly diversified fruit and vegetable farms, even if no single “major crop” suffered a 30 percent loss.
 - **Create a “low documentation” option under NAP.** Create a “low documentation” option under NAP, similar to the “low documentation” approach in the FSA loan programs, to reduce the recordkeeping

¹⁴⁵ The Risk Management Agency has several promising pilot projects to provide crop insurance coverage based upon “Actual Revenue History (ARH).” See Final Resolution (strawberries), available at <http://www.rma.usda.gov/fcic/2009/312strawberry.pdf>.

requirements for small farmers. Consider the use of self-certification of prices and yields as one element of a low documentation option.

- **Provide processes that are participatory, transparent, and fair for the development and implementation of Supplemental Disaster Assistance Programs.** Recommendations for policy change that address this issue include:
 - **Recognize NAD’s statutory authority.** For the benefit of subordinate agencies that often ignore it, USDA should reaffirm the National Appeals Division’s authority to make decisions on appealability and require those agencies to promptly implement NAD decisions. Recognize farmers’ right to appeal the application of average market prices, transition yields, county average yields, and approved yields established under NAP to their individual cases. Appeals are of special importance for fruit and vegetable farmers, whose local USDA officials, due to limited experience with fruit and vegetable operations, may not properly account for the unique character of these types of farms.
 - **Engage in full notice and comment rulemaking** under the next Farm Bill. Notice and comment rulemaking enables the public to weigh in on proposed regulations before they are adopted by a government agency.¹⁴⁶ The practice of exempting ad hoc disaster assistance programs from notice and comment rulemaking produces unnecessarily confusing and ambiguous regulations, resulting in less effective programs, especially with respect to issues of concern to fruit and vegetable growers.
 - **Provide fair and equitable coverage to farmers not participating in yield-based crop insurance or NAP.** Tailor disaster assistance to the type of farming operation, including those operations growing fruit and vegetable crops, and strive to balance efficiency and equity when providing SURE coverage.
 - **Provide equal access to FSA programs.** Develop and implement a plan to provide access to USDA disaster assistance programs on an equal basis to persons who have limited proficiency in English. This is especially critical for immigrant and non-English speaking farmers, who disproportionately grow fruits and vegetables. Provide equal

¹⁴⁶ Where time is of the essence, an interim final rule may be published, allowing for rapid program implementation, yet still providing some opportunity for public participation.

access to USDA programs for farm operators as that provided to farm owners.

- **Provide incentives for good farming practices.** Farmers who utilize farming practices (such as crop diversification, crop rotation, soil conservation, and crop type and variety selection) that increase resilience in the face of natural disaster and climate change should receive enhanced crop insurance and disaster assistance payments, rather than suffer penalties.

Chapter 4

Agriculture Loan Programs

I. INTRODUCTION

With an increasing consumer demand for locally grown produce, there are growing opportunities for fruit and vegetable farmers to participate in more direct marketing channels such as selling at farmers' markets, to schools and other government institutions, to restaurants and grocery stores, and through community supported agriculture structures where consumers invest in a particular farm in exchange for fresh produce during the growing season. Nonetheless, obtaining adequate financing for their farming operations is a significant hurdle for many fruit and vegetable farmers.

Many beginning farmers are particularly interested in pursuing these local and regional fresh produce markets. As beginning farmers, they are often more flexible in responding as new markets develop. However, with the rising cost of farmland and the fact that they are attempting to sell their crops in newly emerging markets, these innovative farmers face the challenge of finding adequate financing at reasonable terms for the purchase of land and to operate their farms.

Minority farmers, including immigrant farmers, also are demonstrating a commitment to growing fresh fruits and vegetables for sale through direct marketing channels. These farmers face additional obstacles to obtaining credit, including a long history of discrimination and language barriers to communication with potential lenders.

USDA's Farm Service Agency (FSA) offers farm loan programs that should be ideal for supporting family farm fruit and vegetable production, both for beginning and existing farmers. But these farmers have had difficulty satisfying the commodity crop-oriented documentation requirements for these programs. Though the 2008 Farm Bill provided some significant improvements in these loan programs, there is a need for continuing increases in federal appropriations for these loan programs and for FSA to make an aggressive commitment to promoting financing of fruit and vegetable farms through staff and lender training; provision of technical assistance to farmers; and changes in loan application, evaluation, and approval policies.

II. AN OVERVIEW OF THE FSA FARM LOAN PROGRAMS

FSA administers direct and guaranteed loan programs for family farmers.¹ These programs offer financing for purchase of farmland and for farm operating expenses including annual operating costs and equipment purchases.

A. FSA Direct Farm Loans

The federal government makes loans directly to family farmers through what is known as the FSA direct farm loan program. Farmers apply for these loans at their county FSA offices. These loans are only available to family farmers. FSA considers a farm to be a family farm when members of the farm family do the majority of the day-to-day labor and make all the strategic management decisions on the farm.²

One of the advantages the FSA direct farm loans offer family farmers is an interest rate that is often below those offered by commercial lenders.

1. Types of Direct Loans

Direct Farm Ownership (FO) loans generally may be used to purchase or make a down payment on a farm; to construct or improve farm dwellings or service buildings; or to promote soil and water conservation and protection.³

Direct Beginning Farmer and Socially Disadvantaged Farmer Downpayment Loans may be used to partially finance the purchase of a family farm by an eligible beginning farmer or a socially disadvantaged farmer.⁴ FSA considers farmers to be beginning farmers if they have not operated a farm for more than 10 years.⁵ Socially disadvantaged farmers are those who are American Indians or Native Americans, Blacks or African Americans, Native Hawaiians or other Pacific Islanders, Hispanics, and women.⁶ Under this program, the beginning farmer or socially disadvantaged farmer must make a cash down payment of at

¹ Statutory authorization for FSA Farm Loan Programs is found at 7 U.S.C. §§ 1981 – 2008r.

² 7 C.F.R. §§ 764.101(k) and 761.2(b), “Family Farm” (2010).

³ 7 C.F.R. § 764.151 (2010).

⁴ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title V, Subtitle A, § 5004, 122 Stat. 1651 (June 18, 2008) (codified at 7 U.S.C. § 1935).

⁵ 7 C.F.R. § 761.2(b), “Beginning Farmer” (2010).

⁶ 7 C.F.R. § 761.2(b), “Socially disadvantaged group” (2010).

least 5 percent of the purchase price of the farm.⁷ FSA may finance up to 45 percent of the purchase price or appraised value, up to a maximum of \$225,000.⁸ The remainder of the financing for the purchase of the farm must be provided by a commercial or cooperative lender. Under this loan program, FSA acts as the primary coordinator and credit supervisor in consultation with a commercial or cooperative lender.⁹ One of the primary advantages of this loan program for beginning farmers is that it provides a significantly reduced interest rate for the FSA financing—4 percent less than the applicable FSA Farm Ownership loan interest rate, down to a minimum of 1.5 percent.

Direct farm Operating (OL) loans generally may be used to cover annual farm operating expenses such as seed, fertilizer, farm supplies, repairs, cash rent, and family living expenses.¹⁰ Operating loans may also be used to purchase equipment and livestock and to refinance debt incurred for operating expenses under certain circumstances.¹¹

Direct Emergency (EM) loans generally are loans that are made available to farmers who have suffered natural disasters on their farms. Emergency loans for physical losses generally may be used to address damage or destruction of real estate and/or chattel property that are essential to the farming operation.¹² Emergency loans for production losses are available to farmers who have suffered a loss of crop or livestock production due to a natural disaster, and may be used to pay annual operating and family living expenses and to replace working capital.¹³ Emergency loans carry special eligibility requirements in addition to the regular direct loan eligibility requirements.¹⁴

⁷ 2008 Farm Bill § 5004 (codified at 7 U.S.C. § 1935(c)). If a beginning farmer or socially disadvantaged farmer is unable to make the 5 percent down payment, he or she may be able to obtain either a regular Farm Ownership loan or a participation loan in which FSA finances 50 percent of the land value and a commercial lender provides the remaining 50 percent financing.

⁸ 2008 Farm Bill § 5004 (codified at 7 U.S.C. § 1935(b)).

⁹ 2008 Farm Bill § 5004 (codified at 7 U.S.C. § 1935 (a)).

¹⁰ 7 C.F.R. § 764.251 (2010).

¹¹ 7 C.F.R. § 764.251 (2010).

¹² 7 C.F.R. §§ 764.351 and 764.151 (2010).

¹³ 7 C.F.R. § 764.351(b) (2010).

¹⁴ 7 C.F.R. § 764.352 (2010).

The 2008 Farm Bill authorized a newly revised program offering family farmers loans to carry out qualified conservation projects.¹⁵ Qualified conservation projects are those included in a particular farmer's USDA-approved conservation plan. They may include projects such as installation of land and water conservation structures, and practices such as those used to create conservation buffer zones or needed to comply with highly erodible land regulations. Congress directed FSA to give priority for these conservation loans to qualified beginning and socially disadvantaged farmers or ranchers; farm owners or tenant operators who use the loans to convert to sustainable or organic agricultural production systems; and farmers who use the loans to build conservation structures necessary to comply with federal highly erodible land regulations.¹⁶

2. Loan Eligibility Criteria

Farmers must meet several eligibility criteria to qualify for a direct loan from FSA. These eligibility criteria include, among other things, that the farmer be a U.S. citizen, a U.S. non-citizen national, or a qualified alien under federal immigration laws; be unable to obtain credit elsewhere at reasonable interest rates and terms; have an acceptable credit history; own or operate a family farm; have sufficient managerial ability to assure reasonable prospects of success on the farm shown by education, training, or experience; not be delinquent on federal debt; and agree to meet borrower training requirements.¹⁷

Many Hmong, Latino, African, and other immigrants to the U.S. are farming or wish to farm. Often these immigrant farmers produce fruits and vegetables for sale at farmers' markets and are interested in finding new direct markets such as schools, restaurants, and grocery stores in their communities. To begin or expand their farming operations, these immigrant farmers need long-term access to land for assurance from year to year that they will be able to continue farming and to allow development of the farmland to suit their particular crops and production methods whether conventional, sustainable, or organic. Many of these farmers, however, are only able to access rental land for one season at a time. FSA loan programs may be available to these farmers for the purchase of farmland and for operating credit; however, many will struggle to meet the eligibility requirements, including that of citizenship or "qualified alien" status.

¹⁵ 2008 Farm Bill § 5002 (codified at 7 U.S.C. § 1924).

¹⁶ 2008 Farm Bill § 5002 (codified at 7 U.S.C. § 1924(d)).

¹⁷ 7 C.F.R., § 764.101 (2010).

3. Loan Approval Criteria

To obtain an FSA direct loan, farmers also must meet approval criteria.¹⁸ The two primary approval criteria require that the farmer: (1) have adequate security to cover the amount of the loan; and (2) can project sufficient farm and off-farm income to show a feasible farm plan.¹⁹

The first loan approval requirement—adequate security—essentially means that the farmer has enough value in real estate, equipment, livestock, and/or crops in which FSA could take a security interest to cover the full amount of the loan. Farmers raising conventional commodities such as corn, soybeans, wheat, rice, and cotton can often obtain annual operating credit by giving FSA a security interest only in that year's crop. Lenders generally are comfortable with making operating loans based on a security interest in these conventionally grown commodity crops, in large part because the annual farm income for such farming operations is supported by federal commodity programs discussed in Chapter 2 and by effective crop insurance and disaster assistance programs discussed in Chapter 3.

These programs provide commodity farmers with some level of “assured income.” However, as is also discussed in those earlier chapters, fruit and vegetable farmers, especially those selling through direct marketing channels or who market organic crops, typically do not have access to the income support of the commodity programs or an adequate safety net, through effective crop insurance or disaster assistance programs, when a natural disaster strikes. Without this income support and risk protection, fruit and vegetable farmers, especially those selling produce through direct marketing channels, do not have the “assured income” lenders often expect as security for operating credit. As a result, these farmers may be required to offer lenders a security interest in other assets, such as their farmland and homes, in order to obtain the loans they need. Because they are required to leverage their real estate assets to obtain operating credit, fruit and vegetable farmers may have a harder time demonstrating that they have adequate value in all of their assets to support their full real estate and operating credit needs.

The second loan approval criterion—feasible farm plan—essentially means that the farmer's farm plan projects sufficient farm and non-farm income to pay all family living and farm operating expenses, service all non-FSA debt, and still make the scheduled loan payments to FSA. The agency's policies regarding assessment of the feasibility of a farm plan require that farmers project the

¹⁸ 7 C.F.R. § 764.401(a) (2010).

¹⁹ 7 C.F.R. § 764.401(a) (2010).

volume of each separate crop that they will produce based on past production histories and use agency-established crop prices to project their income.²⁰

Farmers who raise a large number of fruits and vegetables for direct fresh market sales often have difficulty maintaining records of production yields as they harvest multiple crops just hours before sales time, and they may produce several different crops on the same land during the year. FSA procedures only allow for flexibility in projecting crop yields when natural disaster has affected farmers' past production, by allowing farmers to substitute county or state average yields for the crops damaged by the disaster.²¹ Fruit and vegetable farmers often find that the state and county do not maintain average yields for the numerous crop varieties they grow, making it difficult for them to take advantage of these flexible yield projection procedures even in the limited circumstances when they are available.

In general, FSA policies require that farmers use agency-established crop prices to project income from their farming operations.²² However, FSA often does not establish prices for the crops that many fruit and vegetable farmers produce, especially if they are produced in smaller quantities for direct marketing to consumers, restaurants, or institutions. FSA's policies allow for some flexibility on price projection if the farmer can provide evidence of a premium price through contracts or written agreements that guarantee a certain price.²³ While some large-scale fruit and vegetable growers producing for the wholesale markets may have advance contracts with a processor, many fruit and vegetable farmers who desire to market their produce directly to consumers, restaurants, and grocery stores do not have advance contracts for the purchase of their produce. This makes it difficult for them to comply with FSA's standard farm income projection policies to obtain approval of loans.

²⁰ FSA Handbook 1-FLP (Rev. 1), "General Program Administration," pages 8-85 through 8-93, paras. 241-245 (March 23, 2009), available at http://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a35.pdf.

²¹ FSA Handbook 1-FLP (Rev. 1), "General Program Administration," pages 8-85 through 8-88, para. 241B (March 23, 2009), available at http://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a35.pdf.

²² FSA Handbook 1-FLP (Rev. 1), "General Program Administration," pages 8-85 through 8-88, para. 241B (March 23, 2009), available at http://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a35.pdf.

²³ FSA Handbook 1-FLP (Rev. 1), "General Program Administration," pages 8-85 through 8-88, paragraph 241B (March 23, 2009), available at http://www.fsa.usda.gov/Internet/FSA_File/1-flp_r01_a35.pdf.

Because FSA offices have traditionally dealt with conventional commodity farmers in their service areas, the agency's forms that are used to record and project crop yields and income are not designed to accommodate numerous vegetable crops and the multi-cropping practices of farmers who direct-market their fresh produce. FSA employees are also often not experienced in dealing with such farming operations and are, thus, unable to provide these farmers with the assistance needed to complete applications for FSA loans.

B. FSA Guaranteed Farm Loans

FSA also has a guaranteed loan program. Through this program, FSA guarantees commercial lenders such as banks, credit unions, and Farm Credit Banks against significant losses if a family farmer defaults on the loan.²⁴ Such guarantees are available if a family farmer is unable to obtain credit at reasonable rates and terms without such a guarantee.

FSA's guaranteed Farm Ownership (FO) loans and Operating loans may be used for similar purposes as those in the direct loan programs discussed above.²⁵ In addition, these guaranteed loans may more readily be used than the direct loans to refinance previous farm debt.²⁶ The 2008 Farm Bill's newly revised loans for authorized conservation purposes are also available through the guaranteed loan program.

The farmer eligibility criteria for guaranteed loans are similar to those for direct loans.²⁷ To be approved for a guaranteed loan, a family farmer must also demonstrate that there is adequate security for the loan and that a feasible farm plan can be developed.²⁸ Commercial lenders have slightly more flexibility in assessing farm plans for feasibility, but they are still required to base the plan on the farmer's historical production levels and defensible price projections.²⁹ Many commercial lenders also will have had limited experience in dealing with fruit and vegetable farmers, especially smaller-scale producers selling directly to consumers, restaurants, grocery stores, and institutions. Thus, these farmers will likely experience similar problems in developing a feasible farm plan for commercial lenders as they have with FSA. Commercial lenders may decide that

²⁴ 7 C.F.R. pt. 762 (2010).

²⁵ 7 C.F.R. § 762.121 (2010).

²⁶ 7 C.F.R. § 762.121(a)(vii), (b)(5) (2010).

²⁷ 7 C.F.R. § 762.120 (2010).

²⁸ 7 C.F.R. §§ 762.125 and 762.126 (2010).

²⁹ 7 C.F.R. § 762.125 (2010).

it is not cost effective to devote the time necessary to develop loans for these types of farming operations.

C. Contract Land Sales Program for Beginning and Socially Disadvantaged Farmers

The 2008 Farm Bill made the Contract Land Sales Program for Beginning and Socially Disadvantaged Farmers and Ranchers a permanent program available in all states.³⁰ Under this program, FSA provides financing guarantees to retiring farmers who self-finance the sale of their land to beginning or socially disadvantaged farmers. This program allows a seller to choose either: (1) a payment guarantee whereby FSA guarantees up to three annual installments on the land sales contract if a buyer does not make all of the scheduled payments; or (2) an asset guarantee covering up to 90 percent of the outstanding principal on the loan for sellers who obtain servicing agents. This program is designed to encourage retiring farmers to enter into private land sales with beginning or socially disadvantaged farmers, while providing some protection for the retiring farmers' retirement assets which are often tied up in the farmland.

Since many beginning farmers and socially disadvantaged farmers show an interest in fruit and vegetable production and direct marketing of their produce, this program, if actively pursued, may help more fruit and vegetable farmers find access to land and financing assistance.

D. Loan Set-Asides for Beginning and Socially Disadvantaged Farmers

Over the past 20 years, Congress has directed FSA to set aside a certain percentage of direct and guaranteed loan funds for beginning farmers and ranchers and to set target participation rates in the loan programs for socially disadvantaged farmers and ranchers. Targeting and set-asides are intended to help ensure better access to credit for beginning and socially disadvantaged farmers and to help reverse the trend of an aging farmer population and loss of minority land ownership.³¹

³⁰ 2008 Farm Bill § 5005 (codified at 7 U.S.C. § 1936). For a concise description of this program, see Baker, et al., "Grassroots Guide to the 2008 Farm Bill," at 50-51, Sustainable Agriculture Coalition (Oct. 2008), available at <http://sustainableagriculture.net/publications/grassrootsguide/farming-opportunities/contract-land-sales/>.

³¹ For a concise explanation of how loan fund set-asides and target participation rates work, see Baker, et al., "Grassroots Guide to the 2008 Farm Bill," at 46-47, Sustainable Agriculture Coalition (Oct. 2008), available at

In the 2008 Farm Bill, Congress increased set-aside rates for FSA loan funds for beginning farmers and also authorized socially disadvantaged farmers to have priority consideration for purchase of farmland in FSA inventory during the same 135-day period allowed for beginning farmers and ranchers.³² The set-aside rate for beginning farmers for direct Farm Ownership loans increased from 70 to 75 percent; for guaranteed Farm Ownership loans from 35 to 40 percent; and for direct Operating loans from 35 to 50 percent.³³

Beginning or socially disadvantaged farmers who desire to begin or expand fruit and vegetable production may find better access to credit in the future through FSA loans as a result of these target and set-aside provisions.

III. RECOMMENDATIONS FOR POLICY CHANGE RELATED TO FSA LOAN PROGRAMS

The 2008 Farm Bill made some significant improvements in the FSA farm loan programs that may increase financing available for farmers, particularly beginning or socially disadvantaged farmers, who grow fruits and vegetables for fresh market sale. These improvements include the increased loan set-aside rate for beginning farmers and the addition of a period for priority consideration for purchase of FSA inventory farmland for socially disadvantaged farmers; amendments to the Down-Payment Loan Program; a new conservation loan program; and the expansion and permanency of the Contract Land Sales Program. Between now and the next Farm Bill debate, these programs will need to be closely monitored to determine how effective they are in improving operating and land acquisition financing for fruit and vegetable farmers. Some specific recommendations for further policy development that would help make these loan programs more accessible to fruit and vegetable farmers, including smaller-scale farmers selling in direct marketing channels, are set out here.

Recommendations for policy changes in FSA loan programs include:

- **Increase appropriations.** Encourage Congress to continue increases in appropriations for the full range of FSA direct and guaranteed loan programs.
- **Collect and publish information on fruit and vegetable farmers' access to loan programs.** Direct FSA, for each and every direct and guaranteed loan category, to track the number of loan applications, loan approvals, loan

<http://sustainableagriculture.net/publications/grassrootsguide/farming-opportunities/loan-set-asides/>.

³² 2008 Farm Bill § 5302 (codified at 7 U.S.C. §§ 1985 and 1994).

³³ 2008 Farm Bill § 5302 (codified at 7 U.S.C. § 1994(b)(2)).

denials, and loan amounts for fruit and vegetable farmers, by size of operation and type of marketing channel. FSA should provide reasons for denials of loans and identify policy obstacles that prevented these farmers from obtaining FSA direct or guaranteed loans. This information will be essential in determining the effectiveness of these programs in promoting healthy food production and marketing.

- **Collect and publish fruit and vegetable price and yield information.** Direct USDA to collect and publish more detailed information on a local or regional basis on prices paid and yields obtained for the wide range of fruits and vegetables sold through direct marketing channels, including farmers' markets and Internet sales to consumers; community supported agriculture farms; and direct sales to grocery stores, restaurants, schools, and other institutions, in order to assist FSA in its assessment of farm plan feasibility in the loan approval process.
- **Amend regulations and policies to ease price and yield projections for direct-market fruits and vegetables.** Direct FSA to make any necessary amendments to regulations or policies to accommodate easier farm plan development and assessment, including crop price and yield figures, for farmers growing multiple fruits and vegetables for sale through direct marketing channels, including those channels that do not involve advance written contracts for the sale of produce (e.g., farmers' markets, road side stands, house-to house, and Internet sales directly to consumers).
- **Streamline farm planning and reporting forms.** Direct FSA to develop farm plan forms and recordkeeping or reporting documents that are better suited to farmers who grow numerous different fruit and vegetable crops to facilitate loan applications and reporting requirements for these farmers.
- **Train staff and guaranteed loan lenders.** Direct FSA to develop or acquire training materials and programs for its county and state office staff that provide information on: (1) emerging markets for fruit and vegetable farmers, including the broad range of direct marketing channels; (2) how to assist such farmers to complete loan application and recordkeeping and reporting documents for FSA loans; (3) steps the FSA staff are expected to take to provide the extra technical assistance needed to assist these farmers with loan applications and loan agreement compliance; (4) how FSA will evaluate farm plan feasibility in the loan approval process for these farmers; and (5) steps to take to ensure that immigrant farmers who may have language barriers are provided the necessary assistance in the loan application and loan agreement compliance processes. FSA should mandate that appropriate county and state office personnel attend such trainings and invite lenders using the guaranteed loan program to send appropriate representatives.

- **Provide more technical assistance on loan application process.** Direct FSA staff to provide a higher degree of technical assistance in preparing and completing loan applications to fruit and vegetable farmers in order to promote increased lending to these farmers.
- **Target outreach and technical assistance funding.** Direct USDA to target funding to and/or prioritize projects under outreach and technical assistance programs, e.g., the Outreach and Technical Assistance for Socially Disadvantaged Farmers and Ranchers Program, to providing farm management, financial management, and/or marketing technical assistance to fruit and vegetable farmers, especially farmers selling through direct marketing channels.

Chapter 5

Conservation Programs

I. INTRODUCTION

Although a relatively small part of the 2008 Farm Bill, the Conservation Title represents a growing program area. And, after many years of being almost exclusively the domain of commodity crops and livestock producers, conservation programs are beginning to open up and play an increasing role for producers of non-commodity crops, including fruits and vegetables. In October 2008, the Congressional Budget Office projected that mandatory spending under the 2008 Farm Bill conservation programs would be \$24.3 billion for Fiscal Years 2008 to 2012, out of \$284 billion in total projected 2008 Farm Bill outlays during that period.¹

This chapter will provide a brief overview of the current federal conservation programs that are important to fruit and vegetable production and will discuss how that relationship might be furthered in future Farm Bills.

II. AN OVERVIEW OF THE FEDERAL AGRICULTURAL CONSERVATION PROGRAMS

Federal agricultural conservation programs can be broken into two major categories: land retirement programs and working lands programs. Land retirement programs are intended to remove marginal lands from agricultural production. Working lands conservation programs provide financial and technical assistance to farmers and ranchers to achieve program-specific conservation goals on land used for production agriculture. For both categories of programs, funding is distributed at state and local levels based on ranking according to program-specific criteria.

In addition to providing direct financial and technical support for conservation through these programs, USDA pursues conservation policies by making it an explicit eligibility requirement for other programs—e.g., commodity, credit, and

¹ Johnson, et al., “The 2008 Farm Bill: Major Provisions and Legislative Action” at CRS-16, Congressional Research Service Report for Congress (Oct. 3, 2008), available at <http://ncseonline.org/NLE/CRSreports/08Jun/RL33934.pdf>.

disaster assistance programs—that the farmer be in compliance with standards for protecting wetlands and highly erodible soils.²

Farmers submitting an application for one of the conservation programs must identify the specific conservation practices that will be implemented, from a list of approved practices for that specific program. Whether an application is approved, assuming it was completed properly, will depend on how the farmer-applicant's proposal ranks against other applications from area farmers competing for the available funds. The ranking is determined according to conservation priorities set at the state or county level by committees of farmers and representatives from federal and state natural resource agencies, tribes, agricultural organizations, and environmental organizations.³

A. Land Retirement Programs

Since 1985, when conservation programs first became an important part of Farm Bill policy, most of the funding appropriated through the conservation titles has gone to the two land retirement programs: the Conservation Reserve Program (CRP) and the Wetlands Reserve Program (WRP), with CRP receiving the majority of funding and attention.⁴

Under the land retirement programs, a landowner enters into a multi-year contract and receives an annual rental payment in exchange for foregoing agricultural production on environmentally sensitive land. Under a CRP contract, which lasts for 10-15 years, the landowner must establish a resource-conserving cover crop on the land, usually grasses and/or trees, and must maintain the property for conservation purposes.⁵ Under a WRP contract, which typically lasts for a minimum of 30 years and may be permanent, the landowner must restore and maintain wetlands on the land.⁶

Because they require removing land from agricultural production, the primary importance of the land retirement programs for a healthy foods policy is likely to be the extent to which CRP and WRP rental payments improve a farmer's

² 16 U.S.C. §§ 3811, 3821; 7 C.F.R. pt. 12.

³ See "Conservation Program Delivery," available at <http://www.nrcs.usda.gov/programs/farmbill/1996/DelDgm.html>.

⁴ Classen, "Emphasis Shifts in U.S. Conservation Policy," *Amber Waves* Vol. 1, Issue 5, USDA Economic Research Service (Nov. 2003 updated July 2006), available at <http://www.ers.usda.gov/AmberWaves/July06SpecialIssue/pdf/EmphasisFeatureJuly06.pdf>.

⁵ 16 U.S.C. § 3832.

⁶ 16 U.S.C. §§ 3837a, 3837b.

financial situation and permit the farmer to begin or continue producing fruit or vegetable crops.⁷

B. Working Lands Programs

The 2008 Farm Bill continued a trend begun by the 2002 Farm Bill of gradually shifting the emphasis of conservation programs from land retirement to working lands.⁸ Before the 2002 Farm Bill was enacted, almost 90 percent of conservation funding was dedicated to the land retirement programs. By the end of the 2008 Farm Bill's term in 2012, working lands programs will be receiving more than 50 percent of conservation funding.⁹

The 2008 Farm Bill included some specific directives to USDA that should improve conservation program delivery to farmers growing fruits and vegetables. An overarching directive is to review the list of currently approved practice standards for the conservation programs to ensure that “to the maximum extent practicable” the list fully incorporates items relevant to producers of specialty (i.e., non-commodity) crops.¹⁰

This section discusses the working lands conservation programs that are of particular interest to fruit and vegetable farmers. Other working lands conservation programs include the Wildlife Habitat Incentive Program,¹¹ Grassland Reserve Program,¹² and Healthy Forests Reserve Program.¹³

⁷ See Classen, “Emphasis Shifts in U.S. Conservation Policy,” at 6, *Amber Waves* Vol. 1, Issue 5, USDA Economic Research Service (Nov. 2003 updated July 2006), available at <http://www.ers.usda.gov/AmberWaves/July06SpecialIssue/pdf/EmphasisFeatureJuly06.pdf>.

⁸ Classen, “Emphasis Shifts in U.S. Conservation Policy,” *Amber Waves* Vol. 1, Issue 5, USDA Economic Research Service (Nov. 2003 updated July 2006), available at <http://www.ers.usda.gov/AmberWaves/July06SpecialIssue/pdf/EmphasisFeatureJuly06.pdf>.

⁹ Baker, et al., “The Sustainable Agriculture Coalition’s Grassroots Guide to the 2008 Farm Bill,” at 11 Sustainable Agriculture Coalition (2008), available at <http://sustainableagriculture.net/publications/grassrootsguide>.

¹⁰ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title II, Subtitle H, § 2706, 122 Stat. 1651 (June 18, 2008) (codified at 16 U.S.C. § 3842(h), (i)(1)).

¹¹ See 7 C.F.R. pt. 636.

¹² See 7 C.F.R. pt. 1415.

¹³ See 7 C.F.R. pt. 625.

1. Environmental Quality Incentives Program

The Environmental Quality Incentives Program (EQIP) provides cost-share payments and technical assistance to farmers who adopt approved conservation practices on working agricultural land.¹⁴ The cost-share rate is generally a maximum of 75 percent of the approved cost for a particular conservation practice plus 100 percent of the income forgone by the farmer, if any, as a result of implementing the new conservation practice.¹⁵

Conservation practices eligible for EQIP may be structural practices installed on the land—such as a microirrigation system—or management practices adopted by the farmer—such as establishing a fall cover crop.

Applicants compete at the state and local level for limited pools of funds.¹⁶ Since 2002, 60 percent of EQIP funding has been set aside at the national level for livestock operations.¹⁷

In general, there is a \$300,000 limit on the amount of EQIP payments that a farmer may receive during any six-year period.¹⁸ The 2008 Farm Bill authorized \$50 million in appropriations from 2008 through 2012 for a new EQIP emphasis of supporting conversion to organic production, with a \$20,000 annual payment limit.¹⁹

The 2008 Farm Bill provided new budget authority of \$3.4 billion for EQIP; together with existing program obligations, this brings total EQIP funding authority to \$7.325 billion for Fiscal Years 2008 through 2012.²⁰

2. Conservation Stewardship Program

The Conservation Stewardship Program (CSP) is a new working lands conservation program created by the 2008 Farm Bill.²¹ It replaces the

¹⁴ 16 U.S.C. § 3839aa.

¹⁵ 16 U.S.C. § 3839aa-2(d).

¹⁶ 16 U.S.C. § 3839aa-3.

¹⁷ 16 U.S.C. § 3839aa-2(f).

¹⁸ 16 U.S.C. § 3839aa-7. For projects of “special environmental significance,” the Secretary of Agriculture may raise the limit to \$450,000 over six years.

¹⁹ 2008 Farm Bill § 2503 (codified at 16 U.S.C. § 3839aa-2(i)).

²⁰ Cowan and Johnson, “Conservation Provisions of the 2008 Farm Bill,” at CRS-7 and CRS-8, Congressional Research Service Report for Congress (July 2, 2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL34557.pdf>.

²¹ 2008 Farm Bill § 2301 (codified at 16 U.S.C. § 3838e).

Conservation Security Program,²² a program created by the 2002 Farm Bill which was the subject of considerable criticism from farmers and conservation groups as being too complicated and too limited in geographic availability.²³ What CSP retains from its predecessor program is the novel approach of prioritizing payments to farmers who are good stewards and giving them incentives to adopt still more conservation practices, rather than giving the highest priority to farmers whose land and water resources are in the worst shape.²⁴

CSP provides technical assistance and a per acre payment to farmers who have already implemented conservation practices that meet a certain stewardship threshold and who identify at least one additional conservation practice they intend to adopt.²⁵

A farmer applies for CSP and is ranked against other applicants in the local area based on the farmer's conservation baseline, the proposed new practice(s), and the priority resource concerns that have been identified for the area.²⁶ If approved, the farmer enters into a five-year contract and agrees to meet or exceed the stewardship threshold for at least one additional priority conservation practice by the end of the contract term.²⁷

The 2008 Farm Bill provided additional budget authority (over baseline funding) of more than \$1 billion for CSP for Fiscal Years 2008 through 2012,²⁸ with a target of enrolling 12.8 million acres in CSP each year.²⁹ USDA is directed to manage CSP to achieve a nationwide average per acre payment of \$18.³⁰

²² Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, Title II, Subtitle A, § 2001, 116 Stat. 134 (May 13, 2002) (codified at 16 U.S.C. § 3838a).

²³ See, e.g., Bruckner, "The Conservation Security Program: An Assessment of Farmers' Experience with Program Implementation," Center for Rural Affairs (Sept. 2006), available at http://www.cfra.org/files/CSP_Report_farmerperspective.pdf.

²⁴ 16 U.S.C. § 3838f(a).

²⁵ 7 C.F.R. pt. 1470, subpt. B; "Conservation Stewardship Program," NRCS Fact Sheet (Aug. 2009), available at http://www.nrcs.usda.gov/programs/farmbill/2008/pdfs/csp_fact_sheet-080709.pdf.

²⁶ 7 C.F.R. § 1470.20(c).

²⁷ 7 C.F.R. §§ 1470.21, 1470.22.

²⁸ Cowan and Johnson, "Conservation Provisions of the 2008 Farm Bill," at CRS-7, Congressional Research Service Report for Congress (July 2, 2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL34557.pdf>.

²⁹ Cowan and Johnson, "Conservation Provisions of the 2008 Farm Bill," at CRS-8, Congressional Research Service Report for Congress (July 2, 2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL34557.pdf>.

³⁰ 16 U.S.C. § 3838g(d)(2).

Cropland payment rates should be higher than this national average because the per acre payment rates for pasture, range, and forest lands will be significantly lower.³¹ Payment eligibility is limited to \$200,000 over any five-year period.³²

3. Conservation Technical Assistance

Through the Conservation Technical Assistance (CTA) program, USDA's Natural Resources Conservation Service (NRCS) provides assistance to farmers and other landowners who are seeking to evaluate and improve the land, water, habitat, and other natural resources on their property.³³ Technical assistance is provided directly by NRCS staff or other conservation specialists under NRCS supervision. CTA may be used to help a farmer prepare a conservation plan to be used in an application for EQIP or CSP. CTA may also be used to help a farmer implement an approved EQIP or CSP application.

The 2008 Farm Bill directs USDA to ensure that producers of organic and specialty crops (including fruits and vegetables) have access to adequate technical assistance for implementation of conservation practices.³⁴

4. Farmland Protection Program

The Farmland Protection Program (FPP) provides matching funds to state, tribal, and local governments and non-governmental organizations to help purchase development rights on eligible farmland in order to keep productive farm and ranch land in agricultural use.³⁵ Through FPP, USDA provides up to 50 percent of the fair market value of the conservation easement purchased by the program partner.

The 2008 Farm Bill made a significant change to the FPP program purpose, changing it from protection of topsoil resources to protecting agricultural use.³⁶

This program may be of particular importance for the production of fruits and vegetables for the fresh market because of development pressures on agricultural land near urban and suburban markets.

³¹ "Conservation Stewardship Program: Payment for Performance," available at http://www.nrcs.usda.gov/programs/new_csp/perform.html.

³² 16 U.S.C. § 3838g(g).

³³ 16 U.S.C. § 3842; 7 C.F.R. pt. 610, subpt. A.

³⁴ 2008 Farm Bill § 2706 (codified at 16 U.S.C. § 3842(i)(2)).

³⁵ 16 U.S.C. § 3838i.

³⁶ 2008 Farm Bill § 2401 (codified at 16 U.S.C. § 3838i(b)).

The 2008 Farm Bill reauthorized the FPP and provided budget authority of \$743 million through 2012.³⁷

III. HOW CONSERVATION PROGRAM POLICIES AFFECT FRUIT AND VEGETABLE PRODUCTION

A. Benefits Under the Conservation Programs for Fruit and Vegetable Farmers

The federal agricultural conservation programs offer a wide range of potential benefits to fruit and vegetable farmers. Cost-share assistance provided by EQIP can permit these farmers to adopt conservation practices that will protect land and water resources (e.g., cover cropping, filter strips), improve crop productivity (e.g., pest management, pollinator habitat), and reduce expenses (e.g., irrigation water management, nutrient management). CSP payments reward eligible farmers for stewardship activities they already engage in and provide financial assistance to adopt more, reaping more productivity gains and financial savings. Individualized technical assistance can help identify what conservation practices are best suited to a farmer's specific land and operation for maximum environmental and economic gains. Farmland preservation efforts make it possible for these farmers located close to population centers to withstand development pressure and remain in production agriculture.

With USDA's initial efforts at implementing the 2008 Farm Bill's directive to make the conservation programs more fully available to fruit and vegetable farmers and producers of other specialty (i.e., non-commodity) crops, it becomes readily apparent what varied, and largely untried, opportunities these programs present. For example, in December 2009, NRCS announced a three-year, 38-state pilot study under EQIP for farmers to establish seasonal high tunnel systems—also known as hoop houses—to “increase the availability of locally grown produce in a conservation friendly way.”³⁸ Because hoop houses provide the pest management, plant health, and longer growing season benefits of greenhouse production while being portable and requiring only sunlight for energy, they are easy and inexpensive to build, operate, and maintain.

In another example, the University of Minnesota Entomology Department has reached out to the Minnesota Fruit and Vegetable Growers Association to

³⁷ Cowan and Johnson, “Conservation Provisions of the 2008 Farm Bill,” at CRS-7, Congressional Research Service Report for Congress (July 2, 2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL34557.pdf>.

³⁸ “USDA to Launch High Tunnel Pilot Study to Increase Availability of Locally Grown Foods,” USDA Press Release No. 0617.09 (Dec. 16, 2009), available at <http://www.usda.gov>.

encourage those farmers to take advantage of EQIP incentives for conserving pollinator habitat.³⁹ Farmers whose fruit and vegetable crops depend upon bee pollination can participate in EQIP and receive cost-share financial assistance to establish flowering hedgerows, orchard floor cover crops, or other “bee pastures,” and reap the benefits of building a large resident pollinator population. Other EQIP conservation practices that are likely to be of particular importance for fruit and vegetable farmers include: conservation crop rotations and cover cropping, contour farming and strip cropping, nutrient management, pest management (including Integrated Pest Management), windbreaks and shelterbelts, field borders and filter strips, irrigation water management, grassed waterways and diversions, and safe handling facilities for agrichemicals.⁴⁰

CSP provides rewards and incentives for the same types of conservation activities that EQIP does, as well as a range of additional practices.⁴¹ Several of these are particularly targeted to fruit and vegetable production, such as conversion of inefficient orchard heaters and marketing crop production within 400 miles of where it is produced.⁴²

B. Barriers to Full Participation in Conservation Programs Put Fruit and Vegetable Production at a Competitive Disadvantage

As mentioned above, the 2008 Farm Bill included directives to USDA to ensure greater participation in the conservation programs by farmers producing fruits, vegetables, and other specialty (i.e., non-commodity) crops. The examples in the previous section illustrate some ways that the 2008 Farm Bill directives are being implemented. However, there remain significant barriers to fruit and vegetable farmers’ full participation in the conservation programs. Monitoring and building upon the pilot programs implemented by USDA during the term of the 2008 Farm

³⁹ Mader, “Financial Incentives for Pollinator Conservation,” Minnesota Fruit and Vegetable Growers Association newsletter at 9 (April 2009), available at http://www.mfvga.org/newsletters/200904_mfvga.pdf.

⁴⁰ The specific practices eligible for EQIP are determined at the county level, but many are commonly available nationwide. See, e.g., “List of Eligible Practices and Payment Schedule FY 2010–Wisconsin–Environmental Quality Incentives Program,” NRCS Wisconsin State Office (Feb. 2010), available at <ftp://ftp-fc.sc.egov.usda.gov/WI/eqip/2010/cookbook10.pdf>; “LOUISIANA EQIP HANDBOOK: CHAPTER III Eligible EQIP Practices,” NRCS Louisiana State Office (2008), available at http://www.la.nrcs.usda.gov/programs/EQIP/eligible_practices.pdf.

⁴¹ See the Conservation Stewardship Program: 2009 Enhancement Activity Job Sheets, available at http://www.nrcs.usda.gov/programs/new_csp/2009_jobsheets.html.

⁴² See CSP Jobsheet AIR06, “Replacing Oil and Wood Fired Heaters in Orchards and Vineyards” and CSP Jobsheet ENR05, “Locally Grown and Marketed Farm Products,” available at http://nrcs.usda.gov/programs/new_csp/2009_jobsheets.html#special.

Bill will be an important part of removing these barriers, but a more comprehensive effort is also needed.

Across the country, fruit and vegetable farmers have traditionally had little, if any, interaction with NRCS and the federal agricultural conservation programs. The farmers are unfamiliar with the agency, are largely unaware of the programs and benefits available, and are ill equipped to grapple with the unique requirements of a conservation program application process.

For their part, NRCS staff are generally unfamiliar with the unique characteristics of fruit and vegetable production and do not have established channels for communicating with fruit and vegetable farmers about program opportunities. NRCS staff and the private conservation specialists they collaborate with to provide conservation technical assistance typically lack experience with fruit and vegetable production practices and the unique land, water, pest, and nutrient management concerns these practices present. As a result, they are unable to evaluate and advise fruit and vegetable operations with the same level of sophistication and thoroughness that is offered to commodity farmers.⁴³

Finally, the evaluation criteria for the conservation programs, particularly EQIP, currently put fruit and vegetable farmers in most areas at a disadvantage. Having been developed largely without considering fruit and vegetable production, both the list of eligible conservation practices and the ranking criteria for the conservation programs have a bias towards traditional commodity crops. The unique conservation concerns and opportunities that arise in fruit and vegetable production tend to be either ignored or undervalued. This makes it difficult for farmers growing fruit or vegetables to successfully compete for project approval, or to receive comparable benefits if they are approved.

Although it is a necessary and important step forward for the Farm Bill to direct USDA to overcome these barriers and bring specialty crop producers (including fruit and vegetable farmers) into the conservation programs, simply saying that it must be done will not make NRCS any more familiar with or connected to these farmers and their unique conservation problems. Moreover, the Farm Bill only requires that this integration be done “to the extent practicable,” leaving an opening for USDA to take a few steps but leave the burden on fruit and vegetable farmers to learn about and fit themselves into existing program parameters.

⁴³ See, “Limited Access: How a Lack of Conservation Planning and Technical Assistance Is Limiting the Ability of Small Farmers and Specialty Crop Producers to Participate in Federal Conservation Programs,” Center for Agricultural Partnerships (2005), available at <http://www.agcenter.org/CAPWhitePaper.pdf>.

IV. RECOMMENDATIONS FOR POLICY CHANGES RELATED TO CONSERVATION PROGRAMS

The financial and technical assistance available under the federal agricultural conservation programs can help farmers produce fruits and vegetables in greater amounts and of higher quality. In the 2008 Farm Bill, Congress acknowledged that farmers producing fruit and vegetables and other non-commodity crops have not been full participants in these programs. The directives from Congress in the 2008 Farm Bill and the initial actions USDA has taken to carry out those directives are steps in the right direction. However, much more needs to be done for fruit and vegetable production to make the most of conservation funding and technical assistance.

Recommendations for policy advocacy related to conservation programs include:

- **Increase funding and technical support for working lands programs.** Encourage Congress to continue the trend from the 2002 and 2008 Farm Bills to increase funding and technical support for working lands conservation programs.
- **Recruit fruit and vegetable farmers to be on committees setting program priorities.** Recruit fruit and vegetable farmers, both large- and small-scale, to participate in Natural Resource Conservation Service (NRCS) State Technical Committees and Local Working Groups.
- **Increase fruit and vegetable production pilot conservation projects.** Increase the number and scope of pilot projects designed to verify and measure the conservation benefits from: (1) standard conservation practices applied in the context of fruit and vegetable production; and (2) conservation practices unique to fruit and vegetable production. Pilot projects that provide both financial and technical assistance could be conducted under the Cooperative Conservation Partnership Initiative and through CSP on-farm research and demonstration projects.
- **Adjust priority ranking of conservation practices used by fruit and vegetable farmers.** Based on the results from the pilot projects above and from other investigations, adjust as appropriate at national, state, and local levels the weight given in the ranking system to particular conservation practices in fruit and vegetable production and the financial assistance available for implementing those practices.
- **Train staff and consultants to provide targeted assistance to fruit and vegetable farmers.** Train all NRCS staff and technical assistance consultants how to provide assistance to fruit and vegetable operations. Training should be nationwide, not limited to areas where pilot programs are running.

Training of NRCS staff should address both in-the-field conservation technical assistance and assistance with documentation, planning, and preparing program applications.

- **Recruit fruit and vegetable conservation specialists.** Recruit conservation specialists with expertise in fruit and vegetable production to be partners in the Conservation Technical Assistance program.
- **Conduct outreach to fruit and vegetable farmers.** Conduct comprehensive outreach to fruit and vegetable farmers to inform them of the financial and technical benefits available through the various conservation programs.
- **Remove the statutory provision directing the majority of EQIP dollars to livestock operations.** Eliminate the provision that directs 60 percent of Environmental Quality Incentives Program (EQIP) funds to livestock operations.

Chapter 6

USDA Research Programs

I. INTRODUCTION

USDA's research agencies and programs have tremendous influence on agricultural productivity and innovation. The extent to which a sector of the industry, such as fruit and vegetable production, is the focus of research efforts can have a tremendous impact on that sector's productivity, viability, and access to data that will allow farmers to fully benefit from USDA risk management and conservation programs.

As with other aspects of federal farm policy, the USDA research agenda has historically been dominated by the commodity crops. Titles VII and X of the 2008 Farm Bill, however, include several provisions directing USDA to expand its research horizons.¹

This chapter will provide a brief overview of the USDA research agencies and how those agencies' work can lead to increased fruit and vegetable production, including the new research initiatives mandated by the 2008 Farm Bill. Since those new initiatives are just steps toward research equity for fruit and vegetable production, this chapter will conclude by identifying additional fruit and vegetable research topics that should be advanced.

II. THE RESEARCH AGENCIES

A. Agricultural Research Service

The Agricultural Research Service (ARS) is USDA's primary scientific research agency. With an annual budget of \$1.1 billion, ARS employs 2,100 scientists engaged in approximately 1,200 research projects in topic areas ranging from human nutrition and food safety to air and water quality to crop disease and pest control.²

¹ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Titles VII (Research and Related Matters) and X (Horticulture and Organic Agriculture), 122 Stat. 1651 (June 18, 2008).

² "About ARS," available at <http://www.ars.usda.gov/AboutUs/AboutUs.htm>.

B. Economic Research Service

The Economic Research Service (ERS) is USDA's economic research entity, collecting and analyzing economic data to be used by other USDA agencies, legislators, and private parties in developing policy related to agricultural productivity, farm management, rural development, farm and rural economies, natural resources, food safety and nutrition, and trade.³

C. National Agricultural Statistics Service

The National Agricultural Statistics Service (NASS) is USDA's data collection and analysis agency. NASS conducts hundreds of surveys each year to gather information on crop and animal production and supplies, farm finances, farm labor and wages, prices paid and received by farmers, farm demographics, and environmental conditions, among others.⁴

D. National Institute of Food and Agriculture

The 2008 Farm Bill created a new National Institute of Food and Agriculture (NIFA) to replace the Cooperative Research, Education and Extension Service.⁵ NIFA is now the clearinghouse agency for all USDA competitive grant offerings in 60 research, education, and extension program areas.⁶

III. RESEARCH AGENDAS UNDER THE 2008 FARM BILL RELATED TO FRUIT AND VEGETABLE PRODUCTION

A. Specialty Crop Research Initiative

The 2008 Farm Bill mandates a new Specialty Crop Research Initiative (SCRI) and provides for \$230 million in funding over five years, with authority for appropriations of another \$500 million.⁷ The purpose of the initiative is to develop and disseminate science-based tools to address specific crop needs in areas of plant breeding, pest and disease control, production efficiency and profitability, mechanization and technology, and food safety.

³ "Economic Research Service: Overview," available at <http://www.ers.usda.gov/AboutERS/Overview.htm>.

⁴ "About NASS," available at http://www.nass.usda.gov/About_NASS/index.asp.

⁵ 2008 Farm Bill § 7511.

⁶ "About Us: NIFA Overview," available at <http://www.nifa.usda.gov/about/background.html>.

⁷ 2008 Farm Bill § 7311.

In 2008 and 2009, USDA awarded competitive grants under SCRI for 62 different projects. A listing of the projects and links to individual project abstracts can be found on the website for USDA's National Institute of Food and Agriculture.⁸

B. Organic Research and Extension Initiative

The Organic Research and Extension Initiative (OREI) was first created by the Agricultural Research, Extension, and Education Reform Act of 1998.⁹ OREI's purpose is to support research and education projects that will help farmers already using organic production practices to grow and market high-quality products. The 2002 Farm Bill established six core priorities for OREI: researching production, breeding, and processing methods; evaluating economic benefits of organic methods; exploring international trade opportunities for organic production; identifying desirable traits for organic production; identifying market and policy constraints on the expansion of organic production; and conducting on-farm research.¹⁰

The 2008 Farm Bill greatly increased the funding for OREI, providing for \$78 million for the program from 2008 through 2012 and authorizing appropriations of another \$100 million.¹¹ The 2008 Farm Bill also added two additional research priorities: (1) optimal conservation and environmental outcomes for organic production; and (2) development of seed varieties that are particularly suited to organic production.

From 2004 through 2009, USDA awarded competitive grants under OREI for 57 different projects. A listing of the projects and links to individual project abstracts can be found on the website for USDA's National Institute of Food and Agriculture.¹²

⁸ This list is available at <http://www.nifa.usda.gov/fo/specialtycropresearchinitiative.cfm> (click on "Abstracts of Funded Projects" under "More Information on Eligibility").

⁹ Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, Title II, Subtitle D, § 204, 112 Stat. 555 (June 23, 1998) (codified at 7 U.S.C. § 5925b).

¹⁰ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, Title VII, Subtitle B, § 7218, 116 Stat. 134 (May 13, 2002).

¹¹ 2008 Farm Bill § 7206.

¹² This list is available at <http://www.nifa.usda.gov/fo/organicagricultureresearchandextensioninitiative.cfm> (click on "Abstracts of Funded Projects" under "More Information on Eligibility").

C. Census of Specialty Crop Agriculture

Every five years, NASS conducts a Census of Agriculture to gather information on all aspects of farming and ranching operations in the U.S., including demographics, finances, and production.¹³ The census is a source of uniform, comprehensive agricultural data for every county in the country, and its results are used by policymakers and private service providers throughout the industry.

The 2008 Farm Bill mandates that each Census of Agriculture include a “census of specialty crops,” including fruits and vegetables.¹⁴ In late 2009, NASS released a report which purported to satisfy this statutory mandate but was merely a much condensed compilation of data from the 2007 Census of Agriculture.¹⁵ Indeed this purported “census of specialty crops” contained none of the specific production information on individual specialty crops that was presented in the general report for the 2007 Census of Agriculture.¹⁶ Moreover, the 2007 Census of Agriculture discontinued reporting (and presumably collecting) price and market value data for those fruit and vegetable crops for which such data had been reported in earlier censuses.¹⁷ Although this data was never collected on all fruit and vegetable crops, the failure to continue collecting it where it had been done before is clearly a step backwards for the census.

D. Specialty Crop Block Grant Program

The Specialty Crop Block Grant Program was created by the Specialty Crops Competitiveness Act of 2004.¹⁸ Through this program, USDA makes grants to state departments of agriculture to carry out activities that will enhance the competitiveness of specialty crops, including fruits and vegetables.

¹³ “About the Census,” available at http://www.agcensus.usda.gov/About_the_Census/index.asp.

¹⁴ 2008 Farm Bill § 10103.

¹⁵ “2007 Census of Agriculture: Specialty Crops,” NASS (Nov. 2009), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Specialty_Crops/specialcrop.pdf. Under “Purpose and Scope” on page Introduction V of this report, NASS states, “This publication complies with Section 10103 of the Food, Conservation, and Energy Act of 2008.”

¹⁶ See “2007 Census of Agriculture: United States Summary and State Data,” NASS (Dec. 2009), available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/usv1.pdf.

¹⁷ See the Census of Agriculture “Quick Stats” database, available at <http://quickstats.nass.usda.gov/>.

¹⁸ Specialty Crops Competitiveness Act of 2004, Pub. L. No. 108-465, §§ 2, 3, 118 Stat. 3882 (Dec. 21, 2004).

The 2008 Farm Bill continues this program and provides for \$224 million in funding from 2008 through 2012.¹⁹

IV. RECOMMENDATIONS FOR POLICY CHANGES RELATED TO USDA RESEARCH PROGRAMS

The 2008 Farm Bill's directives regarding research and data collection related to production and marketing of fruits, vegetables, and other specialty (i.e., non-commodity) crops are an encouraging sign. But they do not yet demonstrate a commitment to giving these specialty crops a level of support reflective of their role in agriculture and their importance to a healthy foods policy. For example, the 2008 Farm Bill versions that passed the House of Representatives and the Senate each contained a provision expressing the sense of Congress that ARS research on organic agriculture should be at least commensurate with organic agriculture's share of the U.S. food market.²⁰ Even this relatively modest suggestion on Congress's part was apparently asking too much, as this provision was deleted from the final conference language for the 2008 Farm Bill.

ERS noted in a summary of the research provisions in the 2008 Farm Bill that there has been a long-term decline in specialty crop breeding.²¹ And, although the 2008 Farm Bill funding presents an opportunity to begin to address this decline to some extent, there are so many specialty crops and so many priority research areas that there is no guarantee that even this targeted funding will address that need.

The Specialty Crop Committee of the National Agricultural Research, Extension, Education, and Economics Advisory Board makes annual reports to that Board discussing the opportunities and challenges for specialty crops in the U.S.²² These reports consistently point to some high-priority research needs for specialty crop

¹⁹ 2008 Farm Bill § 10109.

²⁰ H.R. 2419EH, § 7608; H.R. 2419EAS, § 7505.

²¹ "Agricultural Research and Productivity: Farm Act Research Programs," USDA Economic Research Service (Dec. 1, 2008), available at <http://www.ers.usda.gov/Briefing/AgResearch/Programs.htm>.

²² See, "Effectiveness of Research, Extension and Economics Programs for U.S. Specialty Crops," Specialty Crop Committee, NAREEE, USDA (June 2008), available at <http://www.ree.usda.gov/nareeeab/reports/speccrop111808.pdf>; "U.S. Specialty Crops: Opportunities and Challenges," Specialty Crop Committee, NAREEE, USDA (June 9, 2006), available at http://nareeeab.ree.usda.gov/nal_display/index.php?info_center=20&tax_level=3&tax_subject=419&topic_id=1840&level3_id=6303&level4_id=0&level5_id=0&placement_default=0&printer%20=%201.

production, including: (1) detection and prevention of emerging diseases, pests, and invasive species; (2) food safety measures; (3) research aimed at crop families rather than specific crops to maximize impact of research resources; and (4) more efficient irrigation practices and wastewater handling techniques.

Recommendations for policy advocacy related to USDA research programs include:

- **Increase research funding for fruit and vegetable crops.** Maintain or increase funding target levels for specialty crop research initiatives, particularly those geared toward fruit and vegetable production and strategic marketing of these crops to populations experiencing excessive levels of childhood obesity. Ensure that the research needs of farmers operating at different scales of production, from small to mid-sized to large, are addressed. Prioritize research to improve sustainability of fruit and vegetable crop production, especially with respect to reducing resource consumption, reducing pesticide use, and increasing resilience to natural disaster and climate change.
- **Devote research resources to organic and specialty crop production, including evaluation of current research and promotion efforts.** Resurrect and strengthen Congress's instruction to USDA to devote research resources to organic and specialty crop production in amounts that are proportionate to, or exceed, those crops' share of agricultural production. Evaluate the role of marketing orders and research and promotion programs in encouraging or discouraging sustainable production of fruits and vegetables. For example, to what extent do cosmetic standards contribute to waste and farming practices that may unnecessarily endanger farmworkers and the public health?
- **Appropriately direct research needs for the different fruit and vegetable crops.** Analyze research and data collection needs for different types of fruits and vegetables (e.g., citrus fruits, leafy greens, potatoes, and onions) and other categories of specialty crops to determine specific research priorities for different crops. For example, disease management might be the biggest research need for tree fruits while farmers growing leafy greens are clamoring for cost-effective fresh storage options and berry farmers are particularly interested in new mechanization that can reduce labor needs.
- **Collect and publish comprehensive data on fruit and vegetable production.** Undertake directly or through grants to state-level organizations—e.g., land grant universities—comprehensive data collection on specialty crop market prices for all relevant markets including wholesale, retail, and direct market sales, production yields, input requirements and expenses, and other information that farmers need to participate in the federal

conservation and disaster assistance programs on a comparable basis to commodity crop farmers.

Chapter 7

Rural Development, Outreach, and Beginning Farmer and Rancher Development Programs

I. INTRODUCTION

The rural development title of Farm Bills typically includes funding and program criteria for: (1) rural infrastructure, such as electricity generation and transmission, water and wastewater facilities, telephone and broadband access, and housing; (2) creation and support of rural businesses and jobs; and (3) agricultural economic development, including support for cooperatives. This last goal of fostering agricultural economic development, i.e., improving the economic return to the individual farmer and the community through processing and/or marketing enterprises, sometimes appears as a program objective in other Farm Bill titles as well.

This chapter will briefly describe agricultural economic development programs in the 2008 Farm Bill that are likely to be of particular interest and benefit to fruit and vegetable farmers. To the extent programs like these help fruit and vegetable production be financially viable, they make it more likely that farmers will keep producing fruits and vegetables and will perhaps entice other farmers to try growing fruits and vegetables as well. These programs are found in the 2008 Farm Bill in Titles VI (Rural Development) and X (Horticulture and Organic Agriculture).

This chapter will also briefly describe programs in the 2008 Farm Bill aimed at improving the ability of two subpopulations of farmers to succeed in an absolute sense and to fully take advantage of all of the financial and technical support available from USDA. These groups—beginning farmers and minority, so-called “socially disadvantaged,” farmers—are more likely than the general farmer population to produce fruits and vegetables as at least a part of their farming operations.¹ To the extent outreach and development programs can help these

¹ See “2007 Census of Agriculture: Black Farmers,” USDA National Agricultural Statistics Service, available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/black.pdf; “2007 Census of Agriculture: Hispanic Farmers,” USDA National Agricultural Statistics Service, available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/hispanic.pdf; “2007 Census of Agriculture: Asian Farmers,” USDA National Agricultural Statistics Service, available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/asian.pdf; and “2007 Census of Agriculture:

farmers to be successful, there should therefore be more fruit and vegetable production. These programs are found in Titles VII (Research and Related Matters) and XIV (Miscellaneous) of the 2008 Farm Bill.

II. DEVELOPMENT AND OUTREACH PROGRAMS IN THE 2008 FARM BILL RELATED TO FRUIT AND VEGETABLE PRODUCTION

A. Value-Added Producer Grants

The Value-Added Producer Grant program provides grants directly to farmers to help with planning, development, and working capital for “value-added” marketing and processing enterprises.² “Value-added” simply means that the farmer is no longer selling a bulk quantity of crop production straight out of the field, but has taken steps that add value to the bare crop and move it further along the distribution chain, perhaps all the way to the consumer.³ Depending on the circumstances, adding value can mean anything from simply washing and packaging to elaborate processing into a finished food or fiber product.

The 2008 Farm Bill continues authority for the Value-Added Producer Grant program, prioritizes projects that strengthen small- and mid-size farms, provides for \$15 million per year in program funding, and authorizes further appropriations of up to \$40 million each year from 2008 through 2012.⁴ Ten percent of program funds are reserved each year for projects benefitting farmers who qualify under USDA definitions of “beginning farmer or rancher” or “socially disadvantaged farmer or rancher.”⁵ An additional 10 percent of program funds are reserved each year for proposals to develop local and regional supply networks linking independent farmers with businesses marketing value-added products.⁶

B. Local and Regional Food Enterprise Guaranteed Loans

The Business and Industry (B&I) Guaranteed Loan Program is a program administered by USDA’s Rural Development agency and intended to improve the

American Indian Farmers,” USDA National Agricultural Statistics Service, available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/american_indian.pdf.

² 7 C.F.R. pt. 4284, subpt. J (2010).

³ 7 U.S.C. § 1632a(a)(5).

⁴ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title VI, Subtitle C, § 6202, 122 Stat. 1651 (June 18, 2008) (codified at 7 U.S.C. § 1632a).

⁵ 2008 Farm Bill § 6202(b)(2).

⁶ 2008 Farm Bill § 6202(b)(2).

economic and environmental condition of rural communities by helping make credit available for business and industry investment.⁷ The 2008 Farm Bill added a new eligible loan purpose of establishing and facilitating enterprises that process, distribute, aggregate, store, and market locally or regionally produced agricultural products.⁸ To qualify, the agricultural products must travel no more than 400 miles from production to marketing locations, and priority is given to projects that benefit communities with limited access to affordable healthy foods, including fresh fruits and vegetables, and a high poverty or food insecurity rate.⁹ The 2008 Farm Bill requires that USDA reserve at least 5 percent of B&I loan program funds each year for these projects.¹⁰

C. Farmers' Market Promotion Program

The Farmers' Market Promotion Program (FMPP) seeks to increase domestic consumption of agricultural commodities and to develop new farmers' markets and community supported agriculture (CSA) programs.¹¹ The purpose of this program is to help improve and expand domestic farmers' markets, roadside stands, CSA programs, agri-tourism activities, and other direct producer-to-consumer market opportunities.

The 2008 Farm Bill clarifies that the program is intended to support all forms of direct-to-consumer marketing by farmers and specifically adds agri-tourism as an eligible activity.¹² The 2008 Farm Bill also adds associations and networks of farmers as parties eligible to receive assistance under FMPP, along with agricultural cooperatives, nonprofit corporations, and government agencies, among others.¹³ The 2008 Farm Bill provides for \$33 million in funding for FMPP from 2008 through 2012, with at least 10 percent of the funds to be used to support the use of electronic benefits transfer (EBT) for federal nutrition programs at farmers' markets and CSA enterprises.¹⁴

⁷ 7 C.F.R. pt. 4279, subpt. B (2010).

⁸ 2008 Farm Bill § 6015 (codified at 7 U.S.C. § 1932(g)(9)).

⁹ 2008 Farm Bill § 6015 (codified at 7 U.S.C. § 1932(g)(9)(A), (B)(iii)).

¹⁰ 2008 Farm Bill § 6015 (codified at 7 U.S.C. § 1932(g)(9)(B)(v)).

¹¹ "Farmers' Market Promotion Program," available at <http://www.ams.usda.gov/AMSv1.0/FMPP>.

¹² 2008 Farm Bill § 10106 (codified at 7 U.S.C. § 3005).

¹³ 2008 Farm Bill § 10106 (codified at 7 U.S.C. § 3005(c)(1)).

¹⁴ 2008 Farm Bill § 10106 (codified at 7 U.S.C. § 3005(e)).

D. Beginning Farmer and Rancher Development Program

The Beginning Farmer and Rancher Development Program was created by the 2002 Farm Bill and provides competitive grants to partnerships of government agencies, community-based and non-profit organizations, colleges and universities, cooperative extension offices, and other approved entities to provide education, training, technical assistance, and other outreach to beginning farmers and ranchers.¹⁵ Beginning farmers and ranchers are defined for this purpose as persons who have not operated a farm or ranch for a period of more than 10 years.¹⁶ Twenty-five percent of annual funding for the Beginning Farmer and Rancher Development Program is set aside for projects serving low-income and minority, immigrant, and women farmers and ranchers, as well as farmworkers desiring to become farmers in their own right.¹⁷

The 2008 Farm Bill provides \$75 million in funding for the Beginning Farmer and Rancher Development Program from 2009 through 2012, and authorizes further appropriations of up to \$30 million per year from 2008 through 2012.¹⁸

E. Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers

The 1990 Farm Bill created a program to provide outreach and technical assistance services targeted to what USDA terms “socially disadvantaged” farmers and ranchers, i.e., persons who are members of groups that are subjected to racial or ethnic prejudice without regard to their individual qualities.¹⁹ The goal of the program is to encourage and assist these farmers and ranchers in owning and operating farms and ranches and in “participating equitably in the full range of programs offered by [UDSA].”²⁰

The 2008 Farm Bill provides \$75 million in funding for this outreach program for 2009 through 2012.²¹

¹⁵ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, Title VII, Subtitle D, § 7405 116 Stat. 134 (May 13, 2002) (codified at 7 U.S.C. § 3319f).

¹⁶ 7 U.S.C. § 3319f(a).

¹⁷ 7 U.S.C. § 3319f(c)(8).

¹⁸ 2008 Farm Bill § 7410(b).

¹⁹ Food, Agriculture, Conservation, and Trade Act of 1990, Title XXV, § 2501, Pub. L. No. 101-624, 104 Stat. 3359 (Nov. 28, 1990) (codified at 7 U.S.C. § 2279).

²⁰ 7 U.S.C. § 2279(a)(1).

²¹ 2008 Farm Bill § 14004.

III. RECOMMENDATIONS FOR POLICY CHANGES RELATED TO USDA DEVELOPMENT AND OUTREACH PROGRAMS

The rural development and outreach programs described above are not specifically aimed at increasing fruit and vegetable production and distribution. They nonetheless can play an important role in achieving this goal. This is true for some of these programs—B&I Guaranteed Loans for local and regional food enterprises and the Farmers’ Market Promotion Program—because fruits and vegetables are such a good fit for those programs’ criteria of promoting healthy food and supporting direct-to-consumer marketing. Fruit and vegetable production is a high-risk endeavor compared to many other crop choices because of, among other things, the high harvest expenses and the extreme perishability of most fruits and vegetables. The opportunity to gain some income security through a processing or marketing project supported by a Value-Added Producer Grant program should make farmers more likely to begin or continue taking the risk of producing these crops. Appropriately designed grant projects may also help channel these healthy foods directly to markets that reach children.

The outreach programs described above also indirectly support increased fruit and vegetable production. New farmers supported by the Beginning Farmer and Rancher Development Program will generally be looking at crops other than the major commodity crops, because they will not have a personal history of producing the crop required for eligibility for USDA’s commodity payment programs; and the income farmers receive for these crops in the absence of the commodity payments is, in many years, below the costs of producing them. Although fruits and vegetables are not the only non-commodity crops beginning farmers might pursue—nursery crops and aquaculture, for example, are gaining in popularity—with the right support and marketing opportunities, they should be an attractive option.

Outreach and technical assistance for “socially disadvantaged farmers” also has a positive impact on fruit and vegetable production for several reasons. First, like beginning farmers, a very high percentage of these farmers are producing crops other than the major commodity crops. Second, although socially disadvantaged farmers reside throughout the United States, their biggest numbers are located in regions particularly suited to fruit and vegetable production, e.g., African-American farmers in the Southeast, and Hispanic farmers in Florida, Texas, and the Southwest. New immigrant farmers, who are often also socially disadvantaged farmers, typically produce fruits and vegetables, often on small parcels near population centers.

Recommendations for policy advocacy related to the programs discussed above include:

- **Increase funding and program support.** Continue, and consider increasing, financial and program support for the development and outreach programs.
- **Conduct research to quantify participation and benefits.** Conduct economic research to quantify the extent to which fruit and vegetable farmers are participating in and benefitting from the development and outreach programs.
- **Target development and outreach programs.** Consider further targeting of the development and outreach programs to fruit and vegetable production and marketing, as in the Local and Regional Food Enterprise emphasis for the Business & Industry Guaranteed Loan program.

Chapter 8

Nutrition Programs

I. INTRODUCTION

The Nutrition Title of the 2008 Farm Bill accounts for about two-thirds of spending under the bill. In 2008, the Congressional Budget Office estimated that for the federal fiscal years between 2008 and 2012, Farm Bill spending would total just under \$284 billion, and \$189 billion (67 percent) will support the cost of nutrition assistance programs, including food procurement.¹ After passage of the Farm Bill, the American Recovery and Reinvestment Act of 2009 added another \$20.8 billion for the Supplemental Nutrition Assistance Program and other nutrition programs.² (This is 78 percent of the \$26.6 billion allotted to agricultural programs.)

Despite the heavy proportion of Farm Bill funds dedicated to nutrition programs, the nutrition title has historically received far less than a proportionate share of attention and analysis, at least among farmers and farm advocates. As with the rest of this report, our analysis of the nutrition title and related nutrition programs will be focused upon assessing ways in which federal law and policy either encourage or discourage farmers to produce and distribute fruits and vegetables.

When farmers and farm advocates think about the Farm Bill, they tend to think about the supply side, the policies to assist those who produce food. But the Farm Bill also addresses the demand side. In the case of nutrition programs, Congress frequently makes an explicit link between goals of increasing nutrition for low-income persons and goals of improving the agricultural economy. The commodity programs discussed in Chapter 2 provide the context for discussion of nutrition programs. The price of fruits and vegetables has increased relative to the price of

¹ Johnson, et al., “The 2008 Farm Bill: Major Provisions and Legislative Action” at CRS-16, Congressional Research Service Report for Congress, (Oct. 3, 2008), available at <http://ncseonline.org/NLE/CRSreports/08Jun/RL33934.pdf>.

² Monke, et al., “Agriculture, Nutrition, and Rural Provisions in the American Recovery and Reinvestment Act (ARRA) of 2009,” Congressional Research Service Report for Congress (Feb. 23, 2009), available at http://assets.opencrs.com/rpts/R40160_20090223.pdf.

highly processed foods and foods which utilize low-cost commodities such as corn and soybeans.³ These latter foods are often calorie dense but nutrient poor.

There are three types of nutrition programs that are most relevant to farmers. The first type of program includes those in which farmers sell directly to program participants who purchase the farmer's goods using program benefits. The second type includes those programs in which farmers sell their goods to USDA or another government entity for use in nutrition programs. The third type includes those programs that award grants to support food production and distribution in low-income communities. Within these three types of programs, there are some programs which are more directly tailored to encourage farmer participation, though these are invariably the programs with substantially less funding than programs not targeted to encourage farmer participation. In general, the approach of this chapter has been to focus first on the programs that are already tailored for farmer participation. This chapter also seeks to highlight opportunities for policy change in programs with a broader reach and vastly more funding.⁴

One might assume that higher nutrition assistance program benefits or lower prices on fruits and vegetables would encourage higher consumption of these foods by program participants. USDA's Economic Research Service (ERS) has concluded that the evidence is "not promising" for achieving large gains in fruit and vegetable purchases through untargeted increases in food stamp benefits.⁵ ERS concluded that targeted benefits, such as bonuses and vouchers for specific foods, such as fruits and vegetables, may be more effective and efficient ways to increase purchase and consumption of specific foods. Some assurance of increased demand must be in place *before* farmers make substantial shifts in

³ Wallinga, "Today's Food System: How Healthy Is It?," *Journal of Hunger & Environmental Nutrition*, 4:3, 251-281 (2009); Jackson, et al., "Agriculture Policy Is Health Policy," *Journal of Hunger & Environmental Nutrition*, 4:3, 393-408 (2009); Harvie, et al., "A New Health Care Prevention Agenda: Sustainable Food Procurement and Agricultural Policy," *Journal of Hunger & Environmental Nutrition*, 4:3, 409-429 (2009); Sturm, "Affordability and Obesity: Issues in the Multifunctionality of Agricultural/Food Systems," *Journal of Hunger & Environmental Nutrition*, 4:3, 454-465 (2009).

⁴ For example, federal funding for the WIC Farmers' Market Nutrition Program was about \$20 million in 2009, while federal funding for the National School Lunch Program approached \$10 billion.

⁵ Frazao, et al., "Food Spending Patterns of Low-Income Households: Will Increasing Purchasing Power Result in Healthier Food Choices?" at 6, USDA Economic Research Service, Economic Information Bulletin No. 29-4 (Sept. 2007), available at <http://www.ers.usda.gov/publications/eib29/eib29-5/eib29-5.pdf>. See also, Stewart and Blisard, "Are Lower Income Households Willing and Able to Budget for Fruits and Vegetables?," USDA Economic Research Service, Economic Research Report No. 54, (Jan. 2008), available at <http://www.ers.usda.gov/Publications/ERR54>.

planting to increase production of fruits and vegetables. Nothing would discourage farmers from shifting to increased fruit and vegetable production more than watching other farmers do so on the assumption of increased demand which fails to materialize. Farmers must make sufficient income to maintain viable farming operations and support their families if they are to grow and market fruits and vegetables for the long term.

Our analysis of the nutrition programs was guided by five core questions:

1. Which foods may be purchased with nutrition program benefits?

If the program is narrowly tailored to focus upon fresh fruits and vegetables, one might guess it provides a more direct incentive for farmers to grow fruits and vegetables.

2. Who may sell foods to be purchased with nutrition program benefits?

Whether farmers may sell directly to consumers or must sell at wholesale prices to brokers, wholesalers, retailers, or government institutions who participate in the programs may affect their interest in participating in the programs.

3. Is the nutrition program most accessible to large, medium, or small scale farmers?

Some nutrition programs that depend upon direct contact between farmers and program recipients provide excellent opportunities for small farmers. Other nutrition programs that involve sales from farmers to government institutions, food brokers, or retailers may provide opportunities more readily accessed by medium- and large-scale farmers, or groups of smaller-scale farmers.

4. May the value of the nutrition program be enhanced through state, local, or private incentives?

All nutrition programs prohibit vendors from discriminating against program recipients. However, some prohibitions are written so broadly that they have been read to prohibit any different treatment, including more favorable treatment. In the case of such prohibitions, state, local, and private incentives to encourage use of nutrition programs for the purchase of fresh, local, healthy foods have been impeded.

5. Does the nutrition program require or allow a preference for foods that are locally produced?

Whether nutrition programs ought to express a preference for consumption of local foods remains controversial. The arguments against a preference for

local foods include a commitment to purchase foods in nutrition programs at the lowest prices and a belief that no preference among fresh, frozen, or canned should be expressed; rather, the emphasis should be upon increasing consumption of fruits and vegetables in any form. The arguments for a preference for local foods include improved freshness and taste, reduced environmental impact from reduced shipping, a likelihood that the farmer will retain a greater share of the sale price, and opportunities for education, community-building, and greater impact in the local economy.⁶ A preference for local foods is generally believed to provide greater opportunities for small- and medium-scale farmers to participate.

This chapter describes several of the major nutrition assistance programs authorized and funded under the Farm Bill, as well as several programs authorized and funded under other federal laws, such as the Child Nutrition Act. For each of these programs, the analysis considers the five characteristics identified above, and makes recommendations to provide greater encouragement to farmers to produce and distribute fruits and vegetables.

II. FARMERS' MARKET NUTRITION PROGRAM (FMNP)

The Farmers' Market Nutrition Program (FMNP) provides low-income women, infants, children, and seniors with coupons that can be used to buy eligible fruits, vegetables, and herbs from farmers' markets, roadside stands, and community supported agriculture subscription programs. In fact, there are two distinct Farmers' Market Nutrition Programs—one is under the auspices of the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC FMNP), and one is targeted toward seniors (Senior FMNP). Both FMNPs are federal programs administered by the states.

Of all nutrition and anti-hunger programs, it is the FMNPs (and the Community Food Projects discussed below) that most explicitly combine the goals of improving nutrition for low-income persons and providing markets for farmers.⁷

⁶ Meter, "Finding Food in Farm Country," (Crossroads Resource Center, 2001), available at www.crcworks.org; Local Foodshed Mapping Tool for New York State, available at www.cals.cornell.edu/cals/css/extension/foodshed-mapping.cfm; Gussow, "Reflections on Nutritional Health and the Environment: The Journey to Sustainability," *Journal of Hunger & Environmental Nutrition*, 1:1, 3-26 (2006).

⁷ The Centers for Disease Control and Prevention produced a new "State Indicator Report on Fruits and Vegetables" in 2009 to provide information on fruit and vegetable consumption. Two of the key policy and environmental factors identified are: (1) number of farmers' markets per 100,000 U.S. residents (the national average is 1.7); and (2) percentage of farmers' markets that accept WIC FMNP coupons (the national average is 28 percent). See http://fruitsandveggiesmatter.gov/health_professionals.statereport.html and <http://www.fruitsandveggiesmatter.gov/downloads/StateIndicatorReport2009.pdf>.

The FMNPs are attractive to farmers because they provide dedicated funds for purchases made directly from farmers; FMNP coupons may be spent only at approved farmers' markets, roadside stands, and community supported agriculture programs. Accounts of the efforts in states such as Massachusetts and Connecticut to launch some of the earliest pilot projects, which later evolved into the national Farmers' Market Nutrition Program, illustrate the importance of advocacy both by grassroots anti-hunger and farm organizations and by champions within government.⁸

A. Introduction to the Farmers' Market Nutrition Program (FMNP)

FMNP represents a distinctive approach to the five core characteristics of nutrition programs vis-à-vis farmers. In general, it is narrowly focused upon fresh, nutritious, unprepared, locally grown fruits, vegetables, and herbs for human consumption. The only authorized vendors are farmers, though there is some variation from state to state and between the WIC FMNP and Senior FMNP as to which farmers are eligible—farmers, farmers' markets, roadside stands, and community supported agriculture. Thus, FMNP creates a dedicated market, where farmers are competing neither with supermarkets and other retailers, nor with the allure of processed foods. In general, FMNP is likely to be most attractive to smaller farmers. Farmers who grow 30 or fewer acres are those most likely to be able to sell a large proportion of their crops at farmers' markets. Medium- and large-scale farmers build their business plans more upon selling larger quantities of their crops, rather than upon maximizing the value received for each individual unit. FMNP allows the use of incentive programs by non-federal entities, which can help leverage the benefit of FMNP funds. FMNP benefits may be used only for locally produced foods.

1. WIC Farmers' Market Nutrition Program (WIC FMNP)

The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) was authorized in 1972 in an amendment to the Child Nutrition Act of 1966.⁹ Twenty years later, the WIC Farmers' Market Nutrition Program was authorized by the WIC Farmers' Market Nutrition Act of 1992.¹⁰ This was a freestanding bill, not part of the 1990 or 1996 farm bills. Rather, it was styled as an amendment to the Child Nutrition Act of 1966.

⁸ For one such account, see Winne, *CLOSING THE FOOD GAP: RESETTING THE TABLE IN THE LAND OF PLENTY*, at 152-61 (Beacon Press 2008).

⁹ Pub. L. No. 92-433, § 9, 86 Stat. 729 (Sept. 26, 1972).

¹⁰ Pub. L. No. 102-314, § 3, 106 Stat. 280 (July 2, 1992) (codified at 42 U.S.C. § 1786(m)).

Today, the stated reasons for and purpose of the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) are that,

Congress finds that substantial numbers of pregnant, postpartum, and breastfeeding women, infants, and young children from families with inadequate income are at special risk with respect to their physical and mental health by reason of inadequate nutrition or health care, or both. It is, therefore, the purpose of the program authorized by this section to provide . . . supplemental foods and nutrition education through any eligible local agency that applies for participation in the program. The program shall serve as an adjunct to good health care, during critical times of growth and development, to prevent the occurrence of health problems, including drug abuse, and improve the health status of these persons.¹¹

WIC was explicitly designed as a supplement to the food stamp program, now itself known as the Supplemental Nutrition Assistance Program, or SNAP.

The stated purpose of the WIC Farmers' Market Nutrition Program at its founding was to provide grants to state programs in order to:

- (1) provide resources to women, infants, and children who are nutritionally at risk in the form of fresh nutritious unprepared foods (such as fruits and vegetables), from farmers' markets; and
- (2) expand the awareness and use of farmers' markets and increase sales at such markets.¹²

Under WIC FMNP, states and tribes receive a cash grant from the federal government to provide coupons for eligible participants to purchase eligible food products. In 2004, the Child Nutrition and WIC Reauthorization Act made some changes to the FMNP.¹³ The biggest of these changes included the addition of roadside stands to the list of eligible vendors and increases in the federal benefit level.¹⁴

¹¹ 42 U.S.C. § 1786(a).

¹² Pub. L. No. 102-314, § 2 (codified at 42 U.S.C. § 1786 note).

¹³ 7 C.F.R. pt. 248 (2010).

¹⁴ 7 C.F.R. pt. 248 (2010).

2. Senior Farmers' Market Nutrition Program (SFMNP)

The Senior Farmers' Market Nutrition Program (SFMNP) was authorized in the, 2002 Farm Bill.¹⁵ Several changes were made to the Senior FMNP in the 2008 Farm Bill. These changes included the addition of honey to the list of eligible foods and increasing mandatory funding for the program from \$15 million per year to \$20.6 million per year.¹⁶

The purposes of the Senior Farmers' Market Nutrition Program are to:

- (1) provide resources in the form of fresh, nutritious, unprepared, locally grown fruits, vegetables, honey, and herbs from farmers' markets, roadside stands, and community supported agriculture programs to low-income seniors;
- (2) increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic farmers' markets, roadside stands, and community supported agriculture programs; and
- (3) develop or aid in the development of new and additional farmers' markets, roadside stands, and community supported agriculture programs.

Senior FMNP is modeled after WIC FMNP. This section will first describe WIC FMNP in detail, and then will describe the most important ways in which Senior FMNP differs from WIC FMNP.

B. Role of the Federal Government in Administering WIC FMNP

WIC FMNP is a federal program administered in partnership with state and tribal governments. At the federal level, the Food and Nutrition Service (FNS), an agency within the U.S. Department of Agriculture, oversees the program.¹⁷ FNS has seven regional offices.¹⁸ FMNP regulations state that a person seeking information, assistance, records, or other public material should request the information either from the state agency or from the FNS regional office.

¹⁵ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, Title IV, Subtitle D, § 4402, 116 Stat. 334 (May 13, 2002) (codified at 7 U.S.C. § 3007).

¹⁶ Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, Title IV, Subtitle B, § 4231, 122 Stat. 1651 (June 18, 2008) (codified at 7 U.S.C. § 3007).

¹⁷ 7 C.F.R. § 248.3(a) (2010). More specifically, the Supplemental Food Programs Division within FNS administers WIC FMNP.

¹⁸ 7 C.F.R. § 248.25 (2010).

FNS reviews and approves state plans submitted by the state or tribal governments. After it approves a state plan, FNS ranks it compared to other state plans and determines how many states to enter into FMNP agreements with, based upon available funding.¹⁹ In partnership with the state agencies, FNS evaluates the success of the implementation of WIC FMNP.²⁰ FNS may investigate alleged failures to comply with WIC FMNP requirements.²¹

WIC FMNP is funded through the Child Nutrition Act.²² For the years 2004 through 2009, Congress authorized appropriation of “such sums as are necessary,” and began with \$15 million of mandatory funding in 2002. Congress did not enact a new Child Nutrition Act in 2009, but rather passed a one-year extension.

C. The Role of State and Tribal Governments in Administering WIC FMNP

FNS enters into an agreement with a state agency to administer WIC FMNP within the state. A “state agency” may be the agriculture department, the health department, or any other agency approved by the chief executive officer of the state.²³ A state agency may also refer to an Indian tribe, band, or group recognized by the Department of the Interior; an intertribal council or group; or an area office of the Indian Health Service.

The state agency for purposes of administering WIC FMNP may be different from the agency charged with administering WIC (the “WIC agency”) in a state or tribe.²⁴ If so, the state agency and the WIC agency will enter into a written agreement that establishes how the two agencies will coordinate services.

1. Prepare the State Plan

In order to participate in WIC FMNP, a state or tribe must submit a state plan to FNS each year.²⁵ The state plan must address 20 specific topics.²⁶ FNS will

¹⁹ 7 C.F.R. § 248.5 (2010). Approval of a state plan does not obligate FNS to fund WIC FMNP in that state.

²⁰ 7 C.F.R. § 248.17(a) (2010).

²¹ 7 C.F.R. § 248.19(a) (2010).

²² 42 U.S.C. § 1786(m)(9).

²³ 7 C.F.R. § 248.2, “State agency” (2010).

²⁴ 7 C.F.R. § 248.3(e) (2010). See also 7 C.F.R. § 248.4(a)(1) (2010).

²⁵ 7 C.F.R. § 248.3(c) (2010).

²⁶ 7 C.F.R. § 248.4 (2010).

approve or deny the State Plan in writing within 30 days.²⁷ A copy of the approved State Plan must be available at the state agency for public inspection.

2. Authorize, Train, and Monitor Farmers, Farmers' Markets, and Roadside Stands

State agencies develop the criteria for selecting farmers and farmers' markets²⁸ and can decide whether to authorize farmers individually, farmers' markets, or both farmers and farmers' markets.²⁹ The state agency determines an appropriate number of farmers, farmers' markets, and roadside stands to authorize to accept WIC FMNP coupons in order to provide adequate recipient access and allow for effective management of the program by the state agency.³⁰ In a revealing measure of the funding limitations at work in WIC FMNP, the regulations authorize the state agency to create criteria to limit the number of farmers and farmers' markets in the area of service.³¹

The state agency must conduct face-to-face training for both the farmers and the farmer's markets before the beginning of the participating vendor's first year.³² After the first year of participation, the state agency has discretion in determining the method used for annual training purposes.³³ The state agency monitors authorized farmers, markets, and the local agencies within its jurisdiction for

²⁷ 7 C.F.R. § 248.4(a) (2010).

²⁸ 7 C.F.R. § 248.10(a)(2) (2010).

²⁹ 7 C.F.R. § 248.10(a) (2010).

³⁰ 7 C.F.R. § 248.10(a)(3) (2010).

³¹ 7 C.F.R. § 248.10(a)(3) (2010). Compare the "State Indicator Report on Fruits and Vegetables, 2009" from the Centers for Disease Control and Prevention (identifying numbers of farmers' markets and percentage of farmers' markets accepting WIC FMNP as key policy and environmental factors in fruit and vegetable consumption). See http://fruitsandveggiesmatter.gov/health_professionals.statereport.html and <http://www.fruitsandveggiesmatter.gov/downloads/StateIndicatorReport2009.pdf>.

³² 7 C.F.R. § 248.10(d) (2010). The training must address information about eligible food choices, proper coupon redemption procedures, and deadlines for submission of coupons for payment, and equitable treatment of FMNP recipients, including the availability of produce to FMNP recipients that is of the same quality and cost as that sold to other customers. The training must also include information about civil rights compliance and guidelines, guidelines for storing coupons safely, and guidelines for cancelling FMNP coupons.

³³ 7 C.F.R. § 248.10(d) (2010).

compliance with WIC FMNP requirements.³⁴ Monitoring includes developing a system for identifying farmers and markets at the highest risk of noncompliance.

3. List of Eligible Foods

The state agency must develop a list of eligible foods for WIC FMNP in the state.³⁵ Authorized farmers or markets must sell only those eligible foods in exchange for the coupons.³⁶

4. Fiscal Management

The state agency must ensure that farmers and markets are promptly paid for food costs.³⁷

The state agency must match at least 30 percent of the federal grant funds allocated for administrative costs for WIC FMNP with state, local, or private funds.³⁸ Administrative costs of the program may constitute up to 17 percent of the total program costs. States may request an extra 2 percent administration rate for technical assistance and market development in disadvantaged or remote rural areas.

5. Recordkeeping

The state agency must maintain full and complete records of WIC FMNP operations.³⁹

6. Education Regarding WIC FMNP

The state agency must educate each participant regarding WIC FMNP policies.⁴⁰ The state agency is also responsible for integrating nutrition education into the

³⁴ 7 C.F.R. § 248.10(e) (2010).

³⁵ 7 C.F.R. § 248.10(a)(2) (2010).

³⁶ 7 C.F.R. § 248.10(a)(2) (2010).

³⁷ 7 C.F.R. § 248.10(g) (2010).

³⁸ Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. 108-265, 118 Stat. 729 (June 30, 2004).

³⁹ 7 C.F.R. § 248.23(a) (2010). Records the state agency is required to maintain include information about financial operations, coupon issuance and redemption, equipment purchases and inventory, nutrition education, and civil rights procedures.

⁴⁰ 7 C.F.R. § 248.10(i) (2010). The education must include:

(1) a list of names and addresses of authorized famers and markets where the coupons may be redeemed,

WIC FMNP.⁴¹ It may satisfy nutrition education requirements through coordination with other agencies within the state, including the WIC state agency.

D. Eligible Recipients and Benefits under WIC FMNP

As noted above, the goal of this chapter is to enhance understanding of how federal nutrition programs encourage or discourage farmers to produce healthy foods and enable farmers to sell or distribute healthy foods to low-income persons. Thus, the discussion of eligibility for recipients under WIC FMNP and the other programs discussed below will be general.

1. Eligibility

In general, eligible participants for WIC benefits are pregnant, postpartum, and breastfeeding women, infants, and children from low-income families who are deemed by a competent professional to be at a nutritional risk.⁴² To be eligible for WIC FMNP, a person, excluding infants four months and younger, must already be receiving WIC benefits or must be on the waiting list to receive benefits.⁴³

If necessary, state agencies may limit the number of recipients by imposing additional requirements, such as requiring residency in a certain geographical area, certifying only high priority WIC participants, like pregnant and breastfeeding women, or categorizing low priority participants, like those on the waiting list.⁴⁴ The regulations provide little guidance on what would constitute a “necessity” to limit the number of participants in WIC FMNP; presumably, a state’s desire to limit the number of participants might arise in the event that available funding was not sufficient to meet the need.

2. Benefits

Benefits for each recipient or for each family under WIC FMNP are between \$10 and \$30 per year.⁴⁵

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- (2) a description of the eligible foods,
 - (3) the prohibition on cash change for unused FMNP benefits, and
 - (4) an explanation of their right to complain about improper farmer or market practices with regard to FMNP responsibilities and the process for that complaint.

⁴¹ 7 C.F.R. § 248.9 (2010).

⁴² 42 U.S.C. § 1786.

⁴³ 7 C.F.R. § 248.6(a) (2010). See also www.fns.usda.gov/wic/FNMP/FNMPfaqs.htm.

⁴⁴ 7 C.F.R. § 248.6(b) (2010).

⁴⁵ 7 C.F.R. § 248.8 (2010).

E. Eligible Foods in WIC FMNP

In general, eligible foods means fresh, nutritious, unprepared, locally grown fruits, vegetables, and herbs for human consumption.⁴⁶ Each state that participates in FMNP must publish a list of eligible foods.⁴⁷ Eligible foods may not be processed or prepared beyond their natural state except for usual harvesting and cleaning processes. For purposes of WIC FMNP, “locally grown” means produce grown within a state as well as areas in neighboring states adjacent to its borders. Produce grown outside of the United States and its territories is not eligible food.

F. Eligible Vendors in WIC FMNP

Three types of vendors may be authorized to accept and redeem coupons under WIC FMNP: farmers’ markets, farmers, and roadside stands. The state agency determines criteria for the authorization of vendors eligible to accept WIC FMNP.⁴⁸

A person who exclusively sells produce grown by someone else, such as a wholesale distributor, may not participate as a vendor in FMNP.⁴⁹ However, individuals employed by a farmer who is otherwise qualified, or individuals hired by a nonprofit organization to sell produce at urban farmstands on behalf of local farmers, may be authorized vendors under WIC FMNP.⁵⁰

1. Farmers

A farmer must either be authorized by the state or have a valid agreement with an authorized farmers’ market in order to redeem WIC FMNP coupons.⁵¹

2. Farmers’ Markets

A farmers’ market is an association of local farmers who assemble at a defined location for the purpose of selling their produce directly to consumers.⁵²

⁴⁶ 7 C.F.R. § 248.2, “Eligible foods” (2010).

⁴⁷ Honey, maple syrup, cider, nuts, seeds, eggs, meat, cheese, and seafood are examples of foods not eligible for WIC FMNP.

⁴⁸ 7 C.F.R. § 248.10(a)(2) (2010).

⁴⁹ 7 C.F.R. § 248.10(a)(2) (2010).

⁵⁰ 7 C.F.R. § 248.10(a)(2) (2010).

⁵¹ 7 C.F.R. § 248.10(a)(1) (2010).

⁵² 7 C.F.R. § 248.2, “Farmers’ market” (2010).

A farmer's market must be authorized by the state agency in order to redeem FMNP coupons.⁵³

3. Roadside Stands

A roadside stand is a location at which an individual farmer sells his or her produce directly to consumers.⁵⁴ A roadside stand must be authorized by the state agency in order to redeem FMNP coupons.

G. Written Agreements Between the State Agency and Authorized Vendors in WIC FMNP

The state agency must enter into written agreements requiring compliance with WIC FMNP requirements by the participating farmers' markets or farmers.⁵⁵ All participating farmers, farmers' markets, and roadside stands must enter into a written agreement with the state agency.⁵⁶

⁵³ 7 C.F.R. § 248.10(a)(1) (2010).

⁵⁴ 7 C.F.R. § 248.2, "Roadside stand" (2010).

⁵⁵ 7 C.F.R. § 248.10(a) (2010).

⁵⁶ 7 C.F.R. § 248.10(b) (2010).

The state agency may determine the exact wording to be used, but each agreement must contain the following requirements:

(1) The farmer, farmers' market and roadside stand shall: (i) Provide required information; (ii) Assure that FMNP coupons are redeemed only for eligible foods; (iii) Provide eligible foods at the current price or less than the current price charged to other customers; (iv) Accept FMNP coupons within the dates of their validity and submit the coupons for payment within the allowable time period; (v) In accordance with a procedure established by the State agency, mark each transacted coupon with a farmer identifier; (vi) Accept training on FMNP procedures and provide training to farmers and any employees with FMNP responsibilities on such procedures; (vii) Agree to be monitored for compliance with FMNP requirements; (viii) Be accountable for actions of farmers or employees in the provision of foods and related activities; (ix) Pay the State agency for any coupons transacted in violation of this agreement; (x) Offer FMNP recipients the same courtesies as other customers; (xi) Comply with the nondiscrimination provisions of USDA regulations; and (xii) Notify the State agency if any farmer, farmers' market and/or roadside stand ceases operation prior to the end of the authorization period.

(2) The farmer, farmers' market and roadside stand shall not: (i) Collect sales tax on FMNP coupon purchases; (ii) Seek restitution from FMNP recipients for coupons not paid by the State agency; (iii) Issue cash change for purchases that are in an amount less than the value of the FMNP coupon(s).

The written agreements must not exceed three years.⁵⁷ Neither the state agency nor the farmer participant is required to renew the agreement.⁵⁸ Either party may terminate the agreement for cause after providing advance written notice.⁵⁹

H. Nondiscrimination

The state agency is responsible for ensuring that no one is excluded from participation, denied benefits, or otherwise subjected to discrimination under the WIC FMNP program on the grounds of race, color, national origin, age, sex, or handicap.⁶⁰ In addition to prohibiting discrimination, written agreements between a state agency and an authorized vendor place affirmative obligations upon the vendor. For example, an authorized vendor must sell eligible foods at the current price or less than the current price charged to other customers.⁶¹ Authorized vendors must offer recipients the same courtesies as other customers.⁶²

I. Incentive Programs

In recent years, state and local governments and private foundations have all sought to strengthen the incentives created by WIC FMNP and Senior FMNP to shop for fruits and vegetables directly from farmers.⁶³ In general, the incentive provider offers a bonus payment to FMNP recipients who use their benefits. The bonus may be as much as double the FMNP benefits. Early research suggests that the incentives are highly effective in changing recipient behavior and in increasing demand at farmers' markets. In general, these programs are lawful, as long as they comply with the nondiscrimination requirements described above. This is in contrast to obstacles encountered by entities seeking to offer incentive payments for SNAP, discussed below.

J. Appeals

As with any government program, appeal rights and procedures are critical to proper functioning of WIC FMNP and to addressing any problems that may arise. The state agency must have procedures to address complaints, including civil

⁵⁷ 7 C.F.R. § 248.10(b)(7) (2010).

⁵⁸ 7 C.F.R. § 248.10(b)(3) (2010).

⁵⁹ 7 C.F.R. § 248.10(b)(3) (2010).

⁶⁰ 7 C.F.R. § 248.7(a) (2010).

⁶¹ 7 C.F.R. § 248.10(b)(1)(iii) (2010).

⁶² 7 C.F.R. § 248.10(b)(1)(x) (2010).

⁶³ Winch, "Nutrition Incentives at Farmers' Markets: Bringing Fresh, Healthy, Local Foods within Reach" (2008), available at www.farmersmarketcoalition.org.

rights complaints, brought forward by recipients and vendors.⁶⁴ The state agency must provide an appeals process for recipients, local agencies, farmers, and markets that have been adversely affected by state actions.⁶⁵ States that authorize farmers' markets, but not individual farmers, as vendors must ensure that there are procedures in place to allow farmers to appeal an action of the market.⁶⁶

An adverse action may, at the state agency's option, be postponed until a decision in the appeal is rendered.⁶⁷ In a case where an adverse action affects a local agency, farmer, or market, a postponement is appropriate where the state agency finds that recipients would be unduly inconvenienced by the adverse action.⁶⁸ After all appeals within the state have been completed, the affected party has the right to pursue judicial review of the decision.⁶⁹

K. Senior FMNP

Senior FMNP is similar in many respects to WIC FMNP. This section will briefly discuss some areas in which Senior FMNP differs from WIC FMNP.

1. Authority and Funding for Senior FMNP

Authority and funding for Senior FMNP are through the Farm Bill, while WIC FMNP authority and funding issue from the Child Nutrition Act. The federal benefit level for Senior FMNP is between \$20 and \$50 for the season.⁷⁰ However, state agency programs that were in operation in the 2006 federal fiscal year may continue to offer benefits at the same level, even if below the minimum \$20 federal benefit level.

2. Eligible Recipients in Senior FMNP

To receive federal benefits under Senior FMNP, applicants must satisfy three requirements.⁷¹ In general, Senior FMNP recipients must be at least 60 years of age.⁷² Second, the state agency may establish a residency requirement for Senior

⁶⁴ 7 C.F.R. § 248.10(j) (2010).

⁶⁵ 7 C.F.R. § 248.16(a) (2010).

⁶⁶ 7 C.F.R. § 248.16(f) (2010).

⁶⁷ 7 C.F.R. § 248.16(b) (2010).

⁶⁸ 7 C.F.R. § 248.16(b)(1) (2010).

⁶⁹ 7 C.F.R. § 248.16(e) (2010).

⁷⁰ 7 C.F.R. § 249.8(b) (2010).

⁷¹ 7 C.F.R. § 249.6 (2010).

⁷² State agencies may deem Native Americans who are 55 years of age or older eligible. State agencies may also deem eligible those disabled individuals less than 60 years of age

FMNP applicants. Third, participants must not exceed household income limits; in general, not more than 185 percent of the annual poverty income guidelines.

3. Eligible Foods in Senior FMNP

Honey is an eligible food under Senior FMNP. Thus, eligible foods means fresh, nutritious, unprepared, locally grown fruits, vegetables, honey, and herbs for human consumption.⁷³

States may buy food in bulk for redistribution in Senior FMNP. Bulk purchase means a program model in which bulk quantities of certain produce items, such as apples or sweet potatoes, are purchased directly from authorized farmers by the state agency, and are then equitably divided among and distributed directly to eligible Senior FMNP participants, either at a central distribution point (such as a local senior center) or through some type of home delivery network.⁷⁴ One important question is how the states determine from which farmers to make bulk purchases.

4. Eligible Vendors in Senior FMNP

In Senior FMNP, a farmer is an individual authorized to sell eligible foods at participating farmers' markets and/or roadside stands, and through community supported agriculture programs.⁷⁵ Community supported agriculture (CSA) is a program under which a farmer or group of farmers grows food for a group of shareholders (or subscribers) who pledge to buy a portion of the farmer's crop production for that season.⁷⁶ State agencies may purchase shares or subscribe to a CSA program on behalf of individual Senior FMNP participants.⁷⁷

Senior FMNP regulations do not require that trainings for farmers be face-to-face. From the standpoint of farmer vendor participation, this is an improvement.

who are living in housing facilities occupied primarily by older individuals where group nutrition services are provided.

⁷³ 7 C.F.R. § 249.2, "Eligible foods" (2010). Dried fruits or vegetables, such as prunes (dried plums), raisins (dried grapes), sun-dried tomatoes, or dried chili peppers are not considered eligible foods. Potted fruit or vegetable plants, potted or dried herbs, wild rice, nuts of any kind, maple syrup, cider, seeds, eggs, meat, cheese, and seafood are also not eligible foods for purposes of Senior FMNP.

⁷⁴ 7 C.F.R. § 249.2, "Bulk purchase" (2010).

⁷⁵ 7 C.F.R. § 249.2, "Farmer" (2010).

⁷⁶ Henderson and Van En, *SHARING THE HARVEST: A CITIZEN'S GUIDE TO COMMUNITY SUPPORTED AGRICULTURE* (Chelsea Green 2nd ed. 2007).

⁷⁷ 7 C.F.R. § 249.2, "Community supported agriculture (CSA)" (2010). See also 7 C.F.R. § 249.10(a)(6) (2010).

Required travel, even within the state, can present a barrier, particularly where usage of the program may be too low to justify the time and travel in a farmer's business operations. The state agency may use other means to provide the training required.

L. FMNP Recommendations

WIC FMNP and Senior FMNP have a number of strengths. They:

- Are narrowly tailored to encourage the consumption of healthy foods.
- Serve a dual purpose of providing nutrition for low-income persons and direct markets for farmers.
- Provide funding dedicated to purchases at farmers' markets.
- Prohibit discrimination against FMNP recipients, yet allow for innovative non-federal incentive programs.
- Do not require the use of electronic benefit transfer (EBT).

WIC FMNP and Senior FMNP could be improved by:

- Increasing overall funding and individual benefit levels. Targeted benefits (including incentive payments) may be more effective at increasing consumption of fruits and vegetables than untargeted increases in benefits. Higher individual benefit levels under the FMNP programs could encourage more widespread participation.
- Working to integrate WIC FMNP with the new WIC fruit and vegetable benefit discussed below.
- Anticipating and aiding the transition to EBT in order to reduce the financial burden on farmers.
- Adopting innovations from Senior FMNP—including the practices of authorizing CSAs as vendors and allowing alternatives to face-to-face training for vendors—to WIC FMNP.
- Reviewing bulk purchasing practices to ensure the purposes of the program are served and purchases are made fairly.
- Increasing communication between the FMNP agency and the WIC agency, and communicating the responsibilities of each agency clearly to vendors and recipients.

III. SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP)

The Supplemental Nutrition Assistance Program (SNAP) is the new name given to the federal food stamp program by the 2008 Farm Bill. The name change took effect in October 2008. Two reasons have been given for the name change. First, to lessen the stigma attached to receipt of assistance with purchasing foods.⁷⁸ Second, to recognize a change in delivery mechanism for the program—food support is no longer delivered principally through paper coupons, but through Electronic Benefit Transfer, or EBT, using cards similar to debit cards.

SNAP is the largest program under the Nutrition title of the Farm Bill. Use of SNAP has spiked during the current recession, helping to feed as many as one in eight Americans and one in four children.⁷⁹ In 2008, SNAP served 28.4 million people a month at an annual cost of \$34.6 billion.⁸⁰ In February 2009, SNAP served 32.6 million people, a record-high number. The focus of this discussion of SNAP is not on eligibility to receive SNAP, but on the potential for SNAP to encourage farmers to produce and distribute healthy foods (and, in particular, fruits and vegetables) to the children and adults who receive SNAP benefits.

A. Brief Overview of SNAP

SNAP's approach to the five core characteristics of nutrition programs is quite different from that of WIC FMNP and Senior FMNP. SNAP benefits are not restricted to being spent upon fruits and vegetables, nor upon healthy foods in general. Thus, the encouragement to farmers to produce healthy foods and to market them in a manner designed to reach SNAP recipients is likely less than that for more targeted FMNP programs. SNAP authorizes farmers' markets, retail food establishments, and house-to-house trade routes as vendors. SNAP is perhaps most accessible to large- and medium-scale farmers, in that most use of SNAP benefits occurs at retail food stores, including supermarkets, corner stores, and convenience stores. The exclusive use of EBT as a delivery mechanism presents a barrier to some small-scale farmers who sell at farmers' markets. SNAP regulations broadly prohibit treating SNAP recipients differently, which has been interpreted as precluding the use of incentive programs to encourage use of SNAP benefits to buy fruits and vegetables at farmers' markets. The Food and Nutrition Service (FNS), an agency within USDA, has authorized the use of

⁷⁸ DeParle and Gebeloff, "Once Stigmatized, Food Stamps Find Acceptance," N.Y. Times (Feb. 11, 2010) (calling SNAP an "upbeat new name").

⁷⁹ Nord, et al., "Household Food Security in the United States, 2008," USDA Economic Research Service, Economic Research Service Report No. 83 (Nov. 2009); DeParle and Gebeloff, "Food Stamp Use Soars, and Stigma Fades," N.Y. Times (Nov. 29, 2009).

⁸⁰ See <http://www.fns.usda.gov/snap/faqs.htm#25>.

incentive programs in demonstration projects, though this possibility is not well known. SNAP expresses no preference for locally produced foods, though it does require retail food stores to sell at least a minimal amount of perishable foods.

SNAP is a federal program administered by FNS. SNAP benefits are administered by states and tribes. In general, benefits are provided to SNAP participants on a monthly basis in the form of EBT cards. SNAP participants then use the EBT cards to purchase eligible foods from authorized vendors, primarily retail food stores, a term which SNAP regulations define as including farmers' markets.

The law governing SNAP includes a statement of Congressional purpose, which is as follows:

It is hereby declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households. Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation's agricultural abundance and will strengthen the Nation's agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a supplemental nutrition assistance program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.⁸¹

This purpose statement is noteworthy in at least two ways. It states that the purpose of SNAP is to raise levels of nutrition among low-income households, not simply to supply food to hungry people. It states that another purpose of SNAP is to strengthen the nation's agricultural economy and to promote the distribution in a beneficial manner of the nation's agricultural abundance. Thus, an analysis of how SNAP and other federal nutrition programs either encourage or discourage farmers from producing healthy foods, including fruits and vegetables, is entirely consistent with the purposes of the program.

⁸¹ 7 U.S.C. § 2011.

B. Eligible Foods, Seeds, and Plants

It is important to understand one central fact about SNAP. Despite the Congressionally stated goal of “raising levels of nutrition among low-income households,” use of SNAP benefits is not restricted to purchase of nutritious, healthful foods. In fact, SNAP benefits may be used to purchase a range of products intended for human consumption, including candy and soda.

1. In General, Any Food or Food Product Intended for Human Consumption

Eligible foods are those foods that may be purchased with SNAP benefits. In general, eligible foods includes any food or food product intended for human consumption.⁸²

2. Narrow Exceptions

However, alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption are not eligible for SNAP.

3. Items to Facilitate Food Production, Fishing, or Hunting

a. Seeds and Plants for Personal Consumption

Seeds and plants that are used to grow foods for the personal consumption of eligible households are eligible foods. The limitation to use of the seeds and plants to grow foods for personal consumption of eligible households would seem to suggest that the sale of food grown from seeds or plants purchased through the use of SNAP benefits would violate SNAP regulations.

b. Hunting and Fishing Equipment in Parts of Alaska

In the case of certain eligible households living in areas of Alaska—where access to food stores is extremely difficult, and the households rely on hunting and fishing for subsistence—equipment for the purpose of procuring food for eligible households, including nets, lines, hooks, fishing rods, harpoons, knives, and other equipment necessary for subsistence hunting and fishing, are eligible to be purchased using SNAP.

Equipment for the purpose of transportation, clothing, or shelter is not eligible. Firearms, ammunition, and other explosives are also not eligible.

⁸² 7 C.F.R. § 271.2 (2010).

4. Prepared Meals Eligible in Certain Circumstances

As noted above, hot foods and hot food products prepared for immediate consumption are generally not eligible foods for purposes of SNAP. However, prepared meals may be eligible foods for purposes of SNAP in certain circumstances. In general, such circumstances include meals prepared by: authorized meal delivery services, authorized communal dining facilities for the elderly and for Supplement Security Income (SSI) households, drug addiction or alcoholic treatment and rehabilitation centers, group living facilities for blind or disabled residents; battered women's shelters; and homeless meal providers (including soup kitchens, temporary shelters, and restaurants which contract to serve meals to homeless persons).

C. Eligible Vendors

SNAP regulations allow only certain vendors to accept SNAP benefits. FNS determines whether to authorize a retail food store or other vendor to accept SNAP benefits based in part upon the extent to which it sells nutritious staple foods.

A business that would like to sell eligible foods in exchange for SNAP benefits must submit an application.⁸³ FNS will approve or deny the application within 45 days of receipt of a completed application. A completed application means that all information (other than an on-site visit) that FNS deems necessary in order to make a determination on the firm's application has been received.

An applicant shall provide sufficient data and information on the nature and scope of the firm's business for FNS to determine whether the applicant's participation will further the purposes of the program.

The most numerous type of vendor for SNAP is retail food stores (including farmers' markets), but a number of other types of entities may be vendors for purposes of SNAP.

1. Classification of Eligible Foods

One key factor in whether an applicant will be authorized to participate as a vendor in SNAP is the extent to which the applicant sells staple foods, including perishable staple foods.⁸⁴

⁸³ 7 C.F.R. § 278.1(a) (2010).

⁸⁴ 7 C.F.R. § 278.1(b) (2010).

a. Staple Foods

Staple food means food items intended for home preparation and consumption in each of the following food categories:

- vegetables or fruits
- bread or cereals
- dairy products
- meat, poultry, or fish

Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods.

b. Foods with Multiple Ingredients

Commercially processed foods and prepared mixtures with multiple ingredients are counted in one staple food category. For example, foods such as cold pizza, macaroni and cheese, multi-ingredient soup, or frozen dinners, will normally be included in the staple food category of the main ingredient as determined by FNS.

c. Accessory Food Items

Accessory food items including, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, candy, condiments, and spices are not considered staple foods for purposes of determining vendor eligibility. However, once a vendor receives authorization, accessory foods that are offered for sale in authorized retail food stores are eligible food items which may be purchased with SNAP benefits.

2. Retail Food Stores

For purposes of SNAP, a retail food store may take one of five forms.⁸⁵ Two of these forms are of greatest interest for purposes of this analysis. They are “an establishment or house to house trade route” and “a farmers’ market.”⁸⁶

a. Farmers’ Markets

FNS may believe the meaning of farmers’ market is self-evident. No definition of farmers’ market is included in the SNAP regulations.

⁸⁵ 7 C.F.R. § 278.1(b) (2010).

⁸⁶ The other three forms a retail food store may take for purposes of SNAP are communal dining services, sellers of fishing and hunting equipment, and private nonprofit cooperative food purchasing ventures.

b. Establishments and House-to-House Trade Routes

A retail food store for purposes of SNAP includes an establishment or house-to-house trade route that sells food for home preparation and consumption normally displayed in a public area.⁸⁷ A house-to-house trade route is any retail food business operated from a truck, bus, pushcart, or other mobile vehicle. However, in contrast to the lack of detailed explanation with respect to eligibility for farmers' markets, the SNAP regulations provide great detail in explaining when an establishment or house-to-house trade route is eligible.

In order to be an eligible retail food store, an establishment or house-to-house trade route must meet either Criterion A or Criterion B set forth below.⁸⁸

(i) Criterion A: Offer a Variety of Staple Foods

In order to qualify under Criterion A, a store must offer a variety of foods in sufficient quantities in each of the four categories of staple foods (vegetables or fruits; bread or cereals; dairy products; and meat, poultry, or fish).⁸⁹ Specifically, stores must meet the following three requirements:

(A) Display qualifying staple food items on a continuous basis and offer them for sale. This requirement is met by having at least three different varieties of food items in each of the four staple food categories on every day of operation.

(B) Offer perishable staple food items in at least two staple food categories for sale; and

(C) Offer a variety of staple foods. This means different types of foods, such as apples, cabbage, tomatoes, and squash in the fruit or vegetable staple food category, or milk, cheese, butter and yogurt in the dairy category. Similar processed food items with varying ingredients such as, but not limited to, sausages, breakfast cereals, milk, sliced breads, and cheeses, and similar unprocessed food

⁸⁷ 7 C.F.R. § 272.1, "House-to-house trade route" (2010).

⁸⁸ Whether an establishment or house-to-house trade route satisfies at least one of the criteria may be determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stock keeping units, or other inventory or accounting recordkeeping methods that are customary or reasonable in the retail food industry.

⁸⁹ Perishable foods are items which are either frozen staple food items or fresh, unrefrigerated or refrigerated staple food items that will spoil or suffer significant deterioration in quality within two to three weeks.

⁸⁹ 7 C.F.R. § 278.1(b)(1)(ii)(B) (2010).

items, such as, but not limited to, different varieties of apples, cabbage, tomatoes, or squash are not considered as more than one staple food variety for the purpose of determining variety.

(ii) Criterion B: Majority of Sales are in Staple Foods

In order to qualify under Criterion B, stores must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a store, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment/sports/games income. However, a fee directly connected to processing staple foods, such as raw meat, poultry, or fish by the service provider, may be calculated as staple food sales under Criterion B.

Entities that have more than 50 percent of their total gross retail sales in hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption either for carry-out or on-premises consumption, and require no additional preparation, are not eligible as retail food stores.

3. Other Potential Eligible Vendors for SNAP

Retail food stores are not the only potentially eligible vendors for purposes of SNAP. Other potentially eligible vendors include wholesale food concerns, meal services and communal dining facilities, treatment programs, group living arrangements, battered women's shelters, and public and private homeless meal providers.

4. Authorization Process

If approved, the vendor will receive a nontransferable authorization card from FNS. The authorization card is valid only for the time period for which the vendor is authorized to accept and redeem SNAP benefits. The authorization card must be retained by the vendor until the authorization period ends, authorization in the program is superseded, or the card is surrendered or revoked. Authorization is for a period of five years, though FNS retains the authority to periodically request information from a vendor for purposes of reauthorization in the program or to withdraw or terminate a vendor's authorization.

5. Sign Regarding Report of Abuses

Each authorized retail food store must post in a suitable and conspicuous location in the store a sign designed and provided by FNS which provides information on how persons may report abuses they have observed in the operation of the program. A vendor's refusal or repeated failure to display such a sign could result in the withdrawal of approval to participate in the program.

6. Right to Appeal

Any withdrawal or denial of authorization to participate in SNAP as a recipient or vendor is subject to administrative review.⁹⁰

D. Electronic Benefit Transfer

Over the past 20 years, delivery of Food Stamps/SNAP benefits has transitioned from paper “food stamps” and coupons to electronic benefit transfer, or EBT. During those same 20 years, there was a resurgence of interest in farmers’ markets. Ironically, though, the proportion of food stamps redeemed at farmers’ markets fell during this period as a result of a lack of economic and technological resources to accommodate the switch to EBT.⁹¹ The 2008 Farm Bill offers some financial support to farmers’ markets wishing to adopt use of EBT.⁹²

Use of EBT has important benefits.⁹³ Recipients are able to use EBT cards in much the same way other shoppers use debit cards and credit cards, reducing the stigma of SNAP use. Benefits are uploaded to the card automatically, so that recipients need not travel to an office to obtain the benefits. The transition to EBT for SNAP is nearly complete, but is in its early stages for programs such as WIC.⁹⁴ Thus, it is appropriate to examine whether the transition to EBT continues to present barriers to use of SNAP to purchase fruits and vegetables at local farmers’ markets, and such analysis may provide insights applicable to WIC and other nutrition assistance programs.

⁹⁰ 7 C.F.R. pt. 279 (2010).

⁹¹ Megill, “How to Bring Wireless EBT to Your Farmers Market: Bridging the Digital Divide,” [marketumbrella.org](http://www.marketumbrella.org) (2008), available at http://www.marketumbrella.org/uploads/file/ebt_how_to_manual.pdf.

⁹² Not less than 10 percent of the funds available under the Farmers’ Market Promotion Program are to be used to support the use of EBT for federal nutrition programs at farmers’ markets. 2008 Farm Bill § 10106 (codified at 7 U.S.C. § 3005(e)(2)). Based on funding levels set forth in the Farm Bill, this would mean \$500,000 would be available in fiscal years 2009 and 2010, and \$1 million would be available in fiscal years 2011 and 2012.

⁹³ The “State Indicator Report on Fruits and Vegetables, 2009” from the Centers for Disease Control and Prevention identified the percentage of farmers’ markets accepting EBT as a key policy and environmental factor in fruit and vegetable consumption. Yet only 8 percent of farmers’ markets in the nation accept EBT. See http://fruitsandveggiesmatter.gov/health_professionals.statereport.html and <http://www.fruitsandveggiesmatter.gov/downloads/StateIndicatorReport2009.pdf>.

⁹⁴ 7 C.F.R. § 278.12 (2010).

A farmers' market that wishes to accept EBT has several options to complete the transactions. In general, either the market or individual vendors may be responsible for completing EBT transactions. If the farmers' market processes EBT transactions, the market typically provides shoppers with tokens or scrip representing the amount that has been taken from the EBT account for use with individual vendors. If the market has access to a telephone line and has \$100 or more in SNAP sales per month, it may use a free government-supplied wired machine; if not, the market will likely purchase or lease a wireless machine.⁹⁵ In some cases, the market may use manual vouchers.

The market may choose a machine to process EBT transactions only; EBT and debit transactions; or EBT, debit, and credit transactions. The fees for and volume of each of these types of transactions will vary.

E. Incentive Programs

One important tool to encourage use of SNAP benefits for the purchase of healthy foods is incentive programs.⁹⁶

1. Prohibition on Singling Out SNAP Recipients for Different Treatment

SNAP regulations prohibit discrimination against SNAP recipients. They state that,

Coupons shall be accepted for eligible foods at the same prices and on the same terms and conditions applicable to cash purchases of the same foods at the same store except that tax shall not be charged on eligible foods purchased with coupons. . . No retail food store may single out coupon users for special treatment in any way.⁹⁷

It seems clear that the intention of this regulation is to prohibit retailers from singling out SNAP recipients for adverse treatment, yet it is written so broadly

⁹⁵ See http://www.fns.usda.gov/snap/ebt/fm-scrip-EBT_Equipment.htm. See also, Schumacher, et al., "Wireless Card Services: Supporting SNAP (Food Stamp), WIC and Senior Farmers Market Nutrition Programs" (May 2009), available at <http://farmersmarketcoalition.org/resources/home/article/resource-library/2-vouchers-ebt-credit-cards/302-wireless-card-services-supporting-snap-food-stamp-wic-and-senior-farmers-market-nutrition-programs>.

⁹⁶ "Food Stamp Program; Options for Delivering Financial Incentives to Participants for Purchasing Targeted Foods," Government Accountability Office, GAO-08-415 (July 2008).

⁹⁷ 7 C.F.R. § 278.2(b) (2010).

that it has been interpreted by FNS to mean that incentive programs are generally prohibited.

2. Demonstration Projects and Waiver Process

One exception to the prohibition on incentive programs is in the context of demonstration projects. FNS has authority to waive statutory and regulatory requirements for demonstration projects.⁹⁸ In general, demonstration projects test new methods designed to improve program administration and benefit delivery.⁹⁹ Federal funding may be available for demonstration projects.¹⁰⁰ Funds may also be contributed from state, local, and private sources.

Many farmers' markets are unaware of the prohibition on incentive programs, and thus may be in danger of violating the regulatory restriction. Conversely, farmers' markets may be aware of the prohibition, but unaware of the exception authority available for demonstration projects. Even in cases where farmers' markets have been aware of and sought demonstration project status in order to offer incentive payments for use of SNAP to purchase fruits and vegetables at their markets, the application process has not been transparent.¹⁰¹ In practice, FNS has required substantial recordkeeping and reporting as part of its initial application and annual renewal process for demonstration projects.¹⁰²

3. State Laws: California

The state of California enacted legislation to authorize a Healthy Food Purchase Pilot Program in 2006, which would have been funded with a state appropriation.¹⁰³ The state appropriation has not yet been forthcoming. California recently amended the statute to allow implementation when the legislature

⁹⁸ 7 C.F.R. § 282.1 (2010).

⁹⁹ 7 C.F.R. § 271.3 (2010).

¹⁰⁰ 7 C.F.R. § 282.2 (2010).

¹⁰¹ For case studies of demonstration projects, including sample application and approval letters, see Winch, "Nutrition Incentives at Farmers' Markets: Bringing Fresh, Healthy, Local Foods within Reach" (Oct. 2008), available at www.farmersmarketcoalition.org.

¹⁰² As this report went to press, FNS appeared to be relaxing some of these requirements. See http://www.fns.usda.gov/snap/ebt/fm-scrip-Bonus_Incentives.htm, stating that, "[F]armers' markets that plan to implement a healthy incentive project or are already operating an incentive project must notify FNS so that FNS will have an accurate record of all incentive projects in operation across the nation. No reporting other than that required by the sponsoring organization is required to comply with FNS rules and regulations." (Feb. 25, 2010).

¹⁰³ 103 Cal. Health and Safety Code § 104601.

determines that funds from any source—including the state or federal government—will be available.¹⁰⁴

4. Healthy Incentives Pilot

The 2008 Farm Bill authorizes a Healthy Incentives Pilot project to determine whether projects that provide incentives at the point of purchase actually encourage persons in SNAP households to purchase fruits, vegetables, or other healthful foods.¹⁰⁵ The Farm Bill included \$20 million in mandatory funding for the Healthy Incentives Pilot (HIP).¹⁰⁶ The Farm Bill also authorizes pilot projects to increase access to farmers' markets by households participating in SNAP through the use of EBT, though no funding level was specified.¹⁰⁷

FNS held a symposium in October 2008 to discuss opportunities and challenges in implementing HIP. The symposium proceedings are posted on the FNS website.¹⁰⁸ FNS published a request for applications on December 18, 2009.¹⁰⁹ The Request for Applications indicates that one proposal from a state agency will be accepted for a "sub-state area, such as a county, a community, or a group of contiguous communities." The Request further states that the pilot may use up to \$6.3 million of the \$20 million authorized by Congress. This proposal appears to be aimed at studying how to institutionalize HIP throughout SNAP. Many technical complexities will need to be addressed, such as the fact that many retail food stores do not currently record the types of foods purchased through the use of SNAP.

There is undoubtedly a need for a thoughtful, comprehensive effort to institutionalize HIP throughout SNAP. Arguably, using some portion of the HIP funds for the more "low-tech approach" of offering incentives at farmers' markets, as has been done with the FMNP and previous demonstration projects by private, state, and local funders, would also be effective, as well as permitting a comparative cost-benefit analysis of the two approaches. We recommend that, in addition to this single pilot project, USDA use some of the funds authorized by

¹⁰⁴ 103 Cal. Health and Safety Code § 104601(h). See also, "A Vision for California's Healthy Purchase Pilot," California Food Policy Advocates, available at www.cfpa.net.

¹⁰⁵ 2008 Farm Bill § 4141 (codified at 7 U.S.C. § 2026(k)(3)(E)).

¹⁰⁶ 2008 Farm Bill § 4141 (codified at 7 U.S.C. § 2026(k)(5)(B)). Mandatory funding becomes part of the USDA baseline, not requiring an additional appropriation in the annual agricultural appropriations bill.

¹⁰⁷ 2008 Farm Bill § 4141 (codified at 7 U.S.C. § 2026(k)(3)(B)).

¹⁰⁸ See <http://www.fns.usda.gov/FSP/HIP/>.

¹⁰⁹ See <http://www.fns.usda.gov/FSP/HIP/>.

Congress to augment existing private, state, and local demonstration projects to provide incentives at farmers' markets.

F. SNAP Education and Outreach

The 2008 Farm Bill authorizes state agencies to provide nutrition education under SNAP.¹¹⁰ The federal government will partially reimburse the state's costs for conducting SNAP education.

G. SNAP Recommendations

SNAP has a number of strengths:

- Substantial funding and individual benefits.
- Broad cultural acceptance, particularly during a recession.
- Widespread participation by retail food stores.

SNAP could be improved by:

- Providing increased funding, education, and technical assistance for farmers' markets to adopt the use of Electronic Benefits Transfer (EBT).
- Increasing education and outreach to SNAP recipients and vendors regarding the use of SNAP to purchase seeds and plants.
- Revising regulations prohibiting discrimination against SNAP recipients to allow the use of incentives that encourage use of SNAP benefits to purchase fresh fruits and vegetables. In the interim, publicizing the possibility and streamlining the process for becoming a demonstration project for using incentives.
- Using a substantial percentage of remaining funds for Healthy Incentives Program (HIP) for incentives for purchases of fruits and vegetables at farmers' markets.
- Adding a definition for "demonstration project" to the general definitions for SNAP in 7 C.F.R. § 271.2, and including information about demonstration projects in outreach and education about SNAP. Definitions could also be added for research and evaluation projects.
- Adopting pilot projects to limit use of SNAP to staple foods.
- Conducting research into likely economic and behavioral effects of prohibiting use of SNAP for accessory foods.

¹¹⁰ 2008 Farm Bill § 4111 (codified at 7 U.S.C. § 2020).

IV. WOMEN, INFANTS AND CHILDREN (WIC) FRESH FRUIT AND VEGETABLE PROGRAM

In October 2009, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) implemented changes in order to improve the alignment of the package of benefits available with the Dietary Guidelines for Americans.¹¹¹ WIC now provides recipients with monthly cash value vouchers in the amount of \$6 for children, \$8 for women and \$10 for breastfeeding women (\$72-120 per year per person) to purchase fresh fruits and vegetables. Thus, benefits are substantially higher than for FMNP. States may decide whether to allow use of the cash value vouchers at farmers' markets.¹¹²

Analysis conducted by ERS concluded that purchases of fruits and vegetables using WIC will amount to about \$292 million each year.¹¹³ ERS concluded that this would represent about 23 percent of farm revenues realized from the sale of WIC foods. ERS's analysis acknowledged that while WIC increases total food expenditures, it is not a dollar-for-dollar increase. That is, WIC participants would have purchased some of the foods even without the WIC benefits. ERS estimates that WIC generates a net gain of about 26 percent in farm revenues from increased food spending. Based on this, one can estimate that the new WIC fruit and vegetable program may generate a net gain of approximately \$76 million in farm revenues.

The Community Food Security Coalition published a report and recommendations regarding the new WIC produce package.¹¹⁴ Their recommendations include the following:

- Plan pro-actively for farmers' markets in rollout of EBT for the WIC program.
- Encourage states to allow farmers' markets as vendors when implementing new WIC rules.

¹¹¹ "Interim Rule," 72 Fed. Reg. 68,966 (2007) and "Interim Rule, Delay of Implementation Date," 73 Fed. Reg. 14,153 (2008) (changes to WIC regulations are codified throughout 7 C.F.R. pt. 246 (2010)).

¹¹² 7 C.F.R. § 246.12(v) (2010).

¹¹³ Hanson and Oliveira, "Economic Linkages Between the WIC Program and the Farm Sector," USDA Economic Research Service, Economic Brief No. 12, (March 2009), available at <http://www.ers.usda.gov/publications/eb12/>.

¹¹⁴ Tessman and Fisher, "State Implementation of the New WIC Produce Package: Opportunities and Barriers to WIC Clients to Use Their Benefits at Farmers' Markets," Community Food Security Coalition (2009), available at www.foodsecurity.org.

- Explore ways in which WIC clients not participating in the FMNP can receive similar education and information about farmers' markets.
- Explore the connections between the use of SNAP, WIC FMNP, and Senior FMNP benefits at farmers' markets to maximize coordination and synergies.
- Explore the long-term integration of FMNP and the WIC program with the aim of increasing the total dollar value of federal funds flowing to farmers' markets.

V. GOVERNMENT PURCHASES FOR NUTRITION PROGRAMS

Not all nutrition programs involve the use of benefits by program participants in order to purchase foods. Some programs, such as The Emergency Food Assistance Program (TEFAP) and the Commodity Supplemental Food Program, involve donations from USDA to emergency foods shelves, soup kitchens, shelters, and state agencies. The Food Distribution Program on Indian Reservations involves distribution of commodities by USDA in cooperation with tribal organizations. With all of these programs, the opportunity for farmers is to learn how USDA obtains the food it donates. Other programs result in distribution of foods through the School Lunch Program. Again, farmers may find opportunity in selling food to USDA or to their local school district.

A. USDA Procurement Policies

USDA purchases more than \$5 billion per year in goods and services.¹¹⁵ Approximately 60 percent of these dollars are spent on food commodities. This presents a substantial opportunity to encourage production of fruits, vegetables, and other healthy foods.

In addition to appropriations made in the Farm Bill, the Child Nutrition Act, and annual appropriations bills, many of the funds used by USDA to make purchases for nutrition programs are from the Section 32 program, so named after section 32 of a New Deal-era law.¹¹⁶ Section 32 authorizes a permanent appropriation equal to 30 percent of annual gross receipts from U.S. customs.¹¹⁷ Section 32 funds may be used by USDA to fulfill three broad purposes, namely to: (1) encourage the

¹¹⁵ See www.da.usda.gov/smallbus/WebsiteStoryBoard.htm.

¹¹⁶ Act of August 24, 1935, Pub. Law No. 74-320 (codified as amended at 7 U.S.C. § 612c).

¹¹⁷ Becker, "Farm and Food Support Under USDA's Section 32 Program," CRS Report for Congress (Feb. 20, 2009), available at <http://ncseonline.org/NLE/CRSreports/09Mar/RL34081.pdf>.

domestic consumption of agricultural commodities or products by diverting them from the normal channels of trade and commerce or by increasing their utilization among persons in low-income groups (whether through benefits, indemnities, donations, or by other means); (2) encourage exports of agricultural commodities or products; and (3) reestablish farmers' purchasing power.¹¹⁸ In the fiscal year 2007, Section 32 funds equaled approximately \$7 billion per year, of which approximately \$5.7 billion were utilized for child nutrition programs.¹¹⁹

USDA has long had broad discretion regarding the use of Section 32 funds, though in the 2008 Farm Bill, Congress began to provide more direction regarding which commodities to purchase through the use of Section 32 funds. For example, USDA is directed to use Section 32 funds to make grants to states to carry out a Fresh Fruit and Vegetable Program to make free fruits and vegetables available in elementary schools with high participation in the free or reduced-price school meal programs.¹²⁰ Another Farm Bill provision states that USDA shall use additional Section 32 funds (from \$190 million in 2008 to \$206 million in 2012) to purchase fruits, vegetables, and nuts for use in domestic nutrition assistance programs.¹²¹ Further direction from Congress on the use of Section 32 funds could result in increased federal purchases of fruits and vegetables.

While food distribution programs are administered by the Food and Nutrition Services (FNS) within USDA, USDA procurement policies are not found in FNS regulations. Rather, the bulk of USDA commodity procurement programs, including the fruit and vegetable program, are administered by the Agricultural Marketing Service (AMS) within USDA.¹²² Fresh, frozen, and canned fruits and vegetables may be purchased through this program.

¹¹⁸ 7 U.S.C. § 612c.

¹¹⁹ Becker, "Farm and Food Support Under USDA's Section 32 Program," CRS Report for Congress (Feb. 20, 2009), available at <http://ncseonline.org/NLE/CRSreports/09Mar/RL34081.pdf>.

¹²⁰ 2008 Farm Bill §§ 4304 and 14,222(c) (codified at 42 U.S.C. § 1769a.) A similar provision in section 4305 of the Farm Bill provides for grants to purchase whole grain products.

¹²¹ 2008 Farm Bill §§ 4404 (codified at 7 U.S.C. § 612c-5).

¹²² 7 C.F.R. §§ 2.22(a)(viii)(AA), (BB), and (CC) and 2.79(a)(8)(xxxv), (xxxvi), and (xxxvii) (2010). A helpful website is <http://www.commodityfoods.usda.gov/programs.htm>. The Farm Service Agency also assists in procurement activities. 7 C.F.R. § 2.42(a)(11), (12), and (17) (2010).

The laws and regulations governing federal procurement are complex and vary somewhat by program.¹²³ Rather than attempt to set forth these laws in their entirety, this analysis will set out some practical information about how interested farmers might learn more about the process to follow if they are interested in selling fruits and vegetables to USDA, as well as identify barriers to participation by farmers.

AMS has a useful memo, “How to Sell to USDA,” posted on its website.¹²⁴ The first step for farmers or farm businesses interested in bidding on federal contracts to sell fruits and vegetables to USDA is to complete a registration form found on the AMS website’s new vendor application procedures page.¹²⁵ This will place the prospective vendor on USDA’s list to receive e-mail notification of upcoming solicitations. However, the registration process includes requests to provide numerous completed forms and detailed information.¹²⁶ USDA hosts an annual fruit and vegetable commodity procurement industry conference to discuss the commodity purchase and distribution programs. In 2009, the Office of Small and Disadvantaged Business Utilization within USDA launched its Food Commodity Contracting Opportunities for Rural America initiative.¹²⁷ The initiative is a pilot project to provide outreach and technical assistance in the form of regional

¹²³ For samples of relevant regulations, see 7 C.F.R. §§ 210.21 (National School Lunch Program) and 220.16 (School Breakfast Program) (2010). See also, Federal Acquisition Regulations for Agriculture. 48 C.F.R. ch. 4 (2010).

¹²⁴ “How to Sell to USDA,” available at www.ams.usda.gov (click on “Commodity Purchasing,” then click on “Fruits, Vegetables, Nuts, and Specialty Items”).

¹²⁵ Available at www.ams.usda.gov (click on “Commodity Purchasing,” then click on “Fruits, Vegetables, Nuts, and Specialty Items”).

¹²⁶ Requested forms include:

- Name and Address Form
- Mailing List Registration Form
- Vendor Logon ID Request Form for Domestic Electronic Bid Entry System
- Payment Enrollment Form
- Annual Certifications, Representations, and Warranties
- Registration in the Online Representations and Certifications Application (ORCA) System: <https://orca.bpn.gov/>
- Three Reference Letters (must be from fruit and vegetable customers, be on their letterhead and signed with a telephone number for verification purposes)
- Most Current Financial Statement
- Registration in the Central Contractor Registration (CCR) System: <http://www.ccr.gov>
- Small Business Administration (SBA) Certification Letter and a list of SBA approved Standard Industrial Classification (SIC) codes, if any
- Satisfactory Dunn and Bradstreet Report.

¹²⁷ See www.da.usda.gov/smallbus/WebsiteStoryBoard.htm.

conferences intended to assist small farmer-owned cooperatives and small rural businesses to better navigate the complex procurement processes and compete for government and commercial procurement contracts awarded by USDA.

B. Farm to School

In fiscal year 2007, the federal government contributed \$8.7 billion to the National School Lunch Program (NSLP), with \$7.7 billion in cash payments and \$1.04 billion in commodity donations.¹²⁸ Deliberately fostering connections between farms and schools can provide children with fresh, healthy foods and bolster the local economy, while providing children with opportunities for experiential education.¹²⁹ The National Farm to School Program was established as part of the Child Nutrition Act reauthorization in 2004, but no funds were appropriated. Since that time, however, there has been a burgeoning interest in farm to school programs, with pilot programs fueled primarily by staff and volunteer time and state, local, and private funds. USDA launched a farm to school website in December 2009.¹³⁰

The desire to funnel locally produced, healthy vegetables and fruits into schools seems to be gaining widespread acceptance.¹³¹ The 2008 Farm Bill directed the Secretary of Agriculture to encourage institutions operating the Child Nutrition Programs to purchase unprocessed locally grown and locally raised agricultural products.¹³² The implementation of this provision is still in its infancy, and myriad practical questions will be answered over the next several years as more

¹²⁸ Newman, et al., “Balancing Nutrition, Participation, and Cost in the National School Lunch Program” Amber Waves, Economic Research Service (Sept. 2008), available at www.ers.usda.gov/Amberwaves/September08/Features/BalancingNSLP.htm.

¹²⁹ This has not always been the case with the School Lunch Program. See Levine, *SCHOOL LUNCH POLITICS: THE SURPRISING HISTORY OF AMERICA’S FAVORITE WELFARE PROGRAM* (Princeton University Press 2008).

¹³⁰ See www.fns.usda.gov/cnd/F2S/Default.htm.

¹³¹ The “State Indicator Report on Fruits and Vegetables, 2009” from the Centers for Disease Control and Prevention identified the presence of a statewide policy for Farm-to-School as a key policy and environmental factor in fruit and vegetable consumption. Twenty-one states have a state-level policy. See http://fruitsandveggiesmatter.gov/health_professionals.statereport.html and <http://www.fruitsandveggiesmatter.gov/downloads/StateIndicatorReport2009.pdf>.

¹³² 2008 Farm Bill § 4302 (codified at 42 U.S.C § 1758(j)). Under the prior National School Lunch Act, geographic preferences were not permitted. FNS Policy SP 02-2007 (Jan. 23, 2007), available on the USDA Farm to School website, at <http://www.fns.usda.gov/cnd/F2S/Default.htm> (click on “Program Policy”).

institutions undertake farm to school programs.¹³³ The 2008 Farm Bill also authorized a national Fresh Fruit and Vegetable Program (FFVP), under which USDA provides grants to states in order to carry out a program to make free fresh fruits and vegetables available for snacks in elementary schools with a high percentage of students eligible for free or reduced-price meals.¹³⁴ Increased funding is available under the FFVP, starting at \$40 million made available on October 1, 2008, and increasing annually up to \$150 million to be made available on July 1, 2011, with adjustments for subsequent years consistent with the change in the Consumer Price Index.¹³⁵

Thus far, the school districts that have initiated efforts to purchase more locally grown vegetables and fruits have done so primarily through relationships with their current distributors, leaving it to the distributor to forge relationships with

¹³³ USDA has issued a series of memoranda setting forth its interpretation of the Farm Bill provision. USDA's interpretation of "unprocessed foods" has evolved over the course of the series. In a November 13, 2009, memorandum, USDA announced its intention to publish a proposed rule to implement the language authorizing a geographic preference; the agency indicated that until a final rule is published, the policy memorandum will govern. The November 13, 2009, policy memorandum stated that USDA had concluded that unprocessed agricultural products that have been chopped, cut, sliced, diced, or shucked are "unprocessed" as intended by the statute. USDA further broadened its interpretation of "unprocessed" as follows:

At this time, we are further amending the previous guidelines regarding what is to be considered to be "unprocessed locally grown or locally raised agricultural products" when applying the geographic procurement preference option. In our view, for purposes of applying a geographic procurement preference in the Child Nutrition Programs, "unprocessed agricultural products" means only those agricultural products that retain their inherent character. The effects of the following handling and preservation techniques shall not be considered as changing an agricultural product into a product of a different inherent character: cooling, refrigerating, freezing; size adjustment through size reduction made by peeling, slicing, dicing, cutting, chopping, shucking, and grinding; drying/dehydration; washing; the application of high water pressure or "cold pasteurization"; packaging (such as placing eggs in cartons) and vacuum packing and bagging (such as placing vegetables in bags); butchering livestock, fish and poultry; and the pasteurization of milk.

FNS Policy SP 08-2010 (Nov. 13, 2009), available on the USDA Farm To School website at <http://www.fns.usda.gov/cnd/F2S/Default.htm> (click on "Program Policy").

¹³⁴ 2008 Farm Bill § 4304 (codified at 42 U.S.C § 1769a). See also USDA Food and Nutrition Service, "Fresh Fruit and Vegetable Program Handbook," (Aug. 2008), available at <http://www.fns.usda.gov/cnd/FFVP/Resources/FFVPhandbookFINAL.pdf>.

¹³⁵ 2008 Farm Bill § 4304 (codified at 42 U.S.C § 1769a(i)).

local farmers.¹³⁶ From a school district's perspective, this may seem a logical way to proceed, given the challenges of procuring sufficient quantity and quality from local producers, especially for larger urban schools; risk management issues with regard to quantity, quality, delivery, and liability; and the challenge of keeping their budgets in line with federal and state reimbursement rates.

Relying on existing distribution companies, however, may not entirely satisfy the goals of those involved in farm to school efforts. It does not establish a relationship between a school (and its student population) and the vegetable and fruit producers in the area. Using a distributor may add to the cost of the produce for the school, which may make purchasing locally grown produce cost-prohibitive. And distributors may not offer as high a price to the producers as the farmer can receive if she or he sells directly to a purchaser such as other institutions, stores, or consumers.

Other challenges faced by schools that desire to implement farm to school programs in order to reduce childhood obesity include: (1) education and training of food service staff regarding menu planning and recipes that revolve around the local growing season; (2) issues relating to packing and storing produce that is harvested in the summer, when schools are closed; (3) gaining acceptance and enthusiasm for the new menu items from the student population; and (4) inspiring healthier eating habits not just in the students, but with family members who do the grocery shopping and cooking at home.

C. Recommendations

Recommendations for improving federal procurement of agricultural commodities include:

- **Continue and expand efforts to provide technical assistance and networking opportunities** to small farmer cooperatives and rural businesses to help them to compete for federal contracts.
- **Examine the process by which USDA determines which agricultural crops, in which form, to procure.** Ensure that the decisions serve both goals of most nutrition programs—providing improved nutrition to low-income persons and persons who are nutritionally at risk and providing markets for agricultural crops produced by U.S. farmers. Incorporate preferences for local food in all USDA procurement under the National School Lunch Act (NSLA), the Child Nutrition Act (CNA), and all other programs where the authorizing statute does not prohibit it.

¹³⁶ Berkenkamp, "Making the Farm/School Connection: Opportunities and Barriers to Greater Use of Locally-grown Produce in Public Schools," University of Minnesota Department of Applied Economics (2006).

Recommendations for improving the success of farm to school programs include:

- **Direct Purchasing.** School districts should be encouraged in explicit statutory, regulatory, and policy language to purchase vegetables and fruits directly from local farmers where possible. Direct purchasing from farmers could yield multiple benefits, including: reducing costs to schools; increasing profits to local farmers; establishing relationships between the farmers and the schools; and building a sense of community.
- **Hire School District “Procurer.”** In order to establish relationships with farmers, school districts should have a “procurer” within the district whose duty it is to conduct outreach to the local farming community in order to source healthy fruits and vegetables for the district. This position would be akin to community banking officers within banks.
- **Increase School Reimbursement Rates.** School reimbursement rates should be increased for those schools engaged in direct purchasing of fresh, locally produced fruits and vegetables to ensure they are able to purchase high-quality produce and to encourage local fruit and vegetable farmers to enter into contracts to sell directly to school districts.
- **Offer Producers Affordable Insurance.** To help overcome some of the risk management issues that arise in schools contracting directly with farmers, USDA should work with its preferred insurance vendors to offer an affordable insurance product that would be offered to farmers who sell directly to schools.
- **Provide Training.** USDA should establish a program to create a private/public partnership that could engage local and regional experts to provide education and training for food service staff regarding food handling procedures for fresh fruits and vegetables, incorporation of seasonal fresh fruits and vegetables into menu planning, and the development of recipes using the fresh, locally produced fruits and vegetables that are available at different points in the growing seasons. These partnerships could include state Extension agents and local chefs, among others.
- **Establish and Coordinate a Clearinghouse for Healthy Eating Curricula.** The long-term success of Farm to School programs requires not just providing healthy, fresh, locally produced fruits and vegetables. It also means changing the eating behaviors of children and youth in schools and will necessarily require a curriculum component that teaches

about healthy foods and healthy eating.¹³⁷ Curricula have been developed in various schools that have been early leaders in farm to school programs.¹³⁸ In collaboration with the Department of Education and the schools that are implementing Farm to School programs, USDA should establish a clearinghouse that collects those materials and makes them publicly available.

- **Encourage Connections Through Culturally Specific Foods.** In its outreach program, USDA prioritizes funding for projects that link local farmers who grow culturally specific fruits and vegetables with schools that serve the students from the same cultural background.¹³⁹ The same program could fund community-based programs that educate families about health and nutrition. For example, Minnesota has the second largest Hmong population in the country, and the Hmong people in Minnesota are farming in significant and increasing numbers, growing and selling fresh fruits and vegetables at local farmers' markets.¹⁴⁰ Yet, ironically, obesity and diabetes rates in the Hmong population, especially among the youth, are very high.¹⁴¹ Community-based organizations that

¹³⁷ See, e.g., Joshi, et al., "Going Local: Paths to Success for Farm to School Programs," National Farm to School Program (Dec. 2006), available at <http://departments.oxy.edu/uepi/cfj/publications/goinglocal.pdf>.

¹³⁸ See, e.g., The Edible Schoolyard, a program developed by Alice Waters, The Center for Ecoliteracy, and Berkeley's Martin Luther King, Jr. Middle School. Examples of curricula that have been developed can be found on the Farm to School website, www.FarmToSchool.org.

¹³⁹ For example, the Federation of Southern Cooperatives, whose members are predominantly African-American farmers, has launched a number of Farm to School projects, including one in which the New North Florida Farmers Cooperative sells cut and packaged greens to several schools in Florida, Georgia, and Alabama. See <http://federationsoutherncoop.com/marketin.htm>.

¹⁴⁰ "Hmong 2000 Census Publication: Data and Analysis," at 4, Hmong National Development, Inc. and the Hmong Cultural and Resource Center (2004), available at <http://www.hmongstudies.org/HmongCensusReport.pdf>.

¹⁴¹ Gonzales-Campoy, "Obesity in Minority Populations: An Issue of Behavior Modification," American Medical Association web content, available at <http://www.ama-assn.org/ama/no-index/about-ama/12177.shtml>. Researchers have found that: "Hmong adolescents appear to be at increased risk for obesity, body dissatisfaction, and unhealthy weight-control behaviors compared to white adolescents. There is a need for culturally tailored interventions to address these nutrition and weight issues among Hmong adolescents.... Hmong male adolescents participated in extreme unhealthy weight-control behaviors four times more often than white male adolescents." Stang, et al., "Food and Weight-Related Patterns and Behaviors of Hmong Adolescents," *Journal of the American Dietetic Association* Vol. 107, Issue 6 (June 2007).

work with Hmong farmers, Hmong families, and Hmong youth could provide a critical link for schools trying to provide good nutrition and nutritional education to Hmong students and their families.

VI. COMMUNITY FOOD PROJECTS (CFP)

The 2008 Farm Bill included a provision extending authority for Community Food Projects.¹⁴² A community food project is defined as a community-based project that:

- (A) requires a one-time contribution of federal assistance to become self-sustaining; and
- (B) is designed—
 - (i) (I) to meet the food needs of low-income individuals;
 - (II) to increase the self-reliance of communities in providing for the food needs of the communities; and
 - (III) to promote comprehensive responses to local food, farm, and nutrition issues; or
 - (ii) to meet specific state, local, or neighborhood food and agricultural needs, including needs relating to—
 - (I) infrastructure improvement and development;
 - (II) planning for long-term solutions; or
 - (III) the creation of innovative marketing activities that mutually benefit agricultural producers and low-income consumers.¹⁴³

In a report to Congress on “food deserts” required by the Farm Bill, ERS recognized Community Food Projects as a means to generate innovative food system changes within low-income communities.¹⁴⁴ The Farm Bill provision defined a “food desert” as “an area in the United States with limited access to affordable and nutritious food, particularly such an area composed of predominantly lower-income neighborhoods and communities.”¹⁴⁵ In 2007, the Community Food Security Coalition published a useful evaluation of the first ten years of Community Food Projects.¹⁴⁶

¹⁴² 2008 Farm Bill § 4402 (codified at 7 U.S.C. § 2034).

¹⁴³ 2008 Farm Bill § 4402 (codified at 7 U.S.C. § 2034).

¹⁴⁴ “Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences: Report to Congress,” USDA Economic Research Service (June 2009), available at <http://www.ers.usda.gov/publications/ap/ap036/>.

¹⁴⁵ 2008 Farm Bill § 7527 (codified at 7 U.S.C. § 7527).

¹⁴⁶ “Healthy Food, Healthy Communities: A Decade of Community Food Projects in Action,” Community Food Security Coalition (2007), available at www.foodsecurity.org.

VII. RECOMMENDATIONS FOR POLICY CHANGES RELATED TO FEDERAL NUTRITION PROGRAMS

Recommendations for policy changes related to federal nutrition programs are set out at the end of the discussion of each program above. In addition, all of these recommendations are also gathered together and included in Chapter 10 (Policy Recommendations for the Next Farm Bill) of this report.

Chapter 9

Research Priorities to Prepare for the Next Farm Bill

Research will play a critical role in identifying, developing, and building support for policy changes that will encourage farmers to produce and strategically market fruits and vegetables. At the same time, we should not be paralyzed by a quest for perfect knowledge or delay action unnecessarily. In some instances, implementing new policies on the basis of incomplete knowledge may be the best way to gain further insights that will allow for mid-course corrections—which may take the form of legislation or regulatory amendments. Current agricultural law and policy cry out for a “both/ and” strategy of research and action.

I. ECONOMIC RESEARCH: CROP PRICES AND YIELDS

One of the three overarching recommendations of this report concerns the need for collection, publication, and analysis of accurate and comprehensive data regarding fruit and vegetable production and marketing. One of the biggest barriers to creating programs that encourage farmers to produce fruits and vegetables and strategically market them is the lack of detailed information about the volume of these crops produced, production yields, and the prices at which they are sold through their various marketing channels.

The markets for fruits and vegetables are more numerous, varied, and in many cases less formal than those for nonperishable crops. They range from sale to large-scale wholesale distributors who supply fresh, frozen, canned, and processed food retailers to the much smaller-scale direct farmer sales to consumers, schools, restaurants, and grocery stores. Yet price data for fruits and vegetables currently collected by USDA’s Economic Research Service is limited largely to wholesale prices for a limited number of crops in a handful of major cities.¹

One important research product would be comprehensive price data for the wide variety of fruits and vegetables produced, by categories that take into account the type of market in which they are sold (wholesale; retail; direct to individual consumers, grocery stores, or restaurants; and direct sales to schools and other institutions); their intended end use (fresh, frozen, canned, and further processed);

¹ See, e.g., “Briefing Rooms: Fruit and Tree Nuts,” USDA Economic Research Service, available at <http://www.ers.usda.gov/Briefing/FruitAndTreeNuts/>; “Briefing Rooms: Vegetables and Melons,” USDA Economic Research Service, available at <http://www.ers.usda.gov/Briefing/Vegetables/>.

relevant geographical market area (national, regional, local, and export); and, when appropriate, differentiating prices paid by production practices used (conventional, sustainable, heirloom, and organic). All sources of price information accepted as price predictors for USDA programs should be tapped in this effort to gather comprehensive and market-relevant pricing information.²

USDA should also conduct more data collection and analysis to determine the effects of various commodity program changes, especially those related to the fruit and vegetable planting restrictions. The Economic Research Service has engaged in some research on this subject, but it acknowledged that its data modeling was limited by a lack of comprehensive data for fruit and vegetable markets.³ With more comprehensive and market-specific data, ERS could effectively analyze the impacts of a policy permitting acre-for-acre payment reductions on all Direct and Counter-cyclical Program base acres planted to fruits and vegetables, for example, as compared to the impacts of removing the planting restrictions entirely with no reduction in eligibility for commodity program payments on the affected acres.

USDA should, at a minimum, analyze the economic impact of the 2008 Farm Bill's pilot project allowing farmers to plant vegetables grown for processing on base acres in the Midwest. USDA should also create models for other potential appropriately targeted exceptions to the commodity programs' fruit and vegetable planting restrictions, such as land planted to crops that will be direct-marketed to consumers, grocery stores, restaurants, or sold to local schools and other government institution; or crops that are grown by beginning farmers, or produced on land in conversion to organic production.

II. SPECIALTY CROP INSURANCE

In 1994, Congress directed Federal Crop Insurance Corporation to prepare a report to Congress on the feasibility of offering a crop insurance program designed to meet the needs of specialized producers of vegetables and other perishable crops who market through direct marketing channels. A "Report on

² These sources include the National Agricultural Statistics Service (NASS), the Cooperative State Research, Education, and Extension Service (CSREES), Rural Development, local markets, Farm Service Agency county committees, prices in similar areas, universities, Agricultural Marketing Service (AMS) Market News, and buyers. See Handbook 1-NAP (Rev. 1), "Non-insured Crop Disaster Assistance Program for 2001 and Subsequent Years," page 3-7, para. 108C (June 12, 2007), available at http://www.fsa.usda.gov/Internet/FSA_File/1-nap_r01_a52.pdf.

³ Johnson, et al., "Eliminating Fruit and Vegetable Planting Restrictions: How Would Markets Be Affected?" Economic Research Report No. 30, USDA Economic Research Service (Nov. 2006), available at <http://www.ers.usda.gov/publications/err30>.

Specialty Crop Insurance” published by the Risk Management Agency in May 2004 provides a helpful overview of progress made in the decade from 1994 to 2004. Research for this report revealed no more recently written reports of this kind. We recommend that RMA or the Government Accountability Office produce a similar report in 2010, including analysis of crop insurance products designed for direct-marketed fruits and vegetables, and every two to four years thereafter. The reports should be used as a tool to monitor, intensify, and accelerate RMA’s progress in developing new risk management products.

III. FARM BUSINESS RECORDKEEPING SYSTEMS

USDA could make a substantial contribution to encouraging fruit and vegetable production if it were to develop and streamline price and yield reporting forms used in USDA insurance, disaster, loan, and conservation programs. If this were done, individual farmers could quickly and easily record the yields and prices of their fruit and vegetable crops in a manner that would be acceptable for all of these USDA programs. USDA should draw from the experiences of farmers who have designed recordkeeping systems from scratch for their own farms, and from specialists who have been working with fruit and vegetable farmers to develop farm business management systems and strategies.⁴ Streamlining and making consistent recordkeeping and reporting forms for USDA programs may help farmers efficiently maintain records necessary to apply for disaster, credit, conservation, and other farm programs. These changes should also improve the collection of data USDA needs to analyze the fruit and vegetable industries and to target appropriate incentive programs for the production and strategic marketing of these healthy food crops.

IV. AGRICULTURE OF THE MIDDLE AND BUILDING INFRASTRUCTURE FOR DISTRIBUTION

Researchers have just begun to analyze the “agriculture of the middle”—farms that straddle the line between large and small and between the production of

⁴ One example is DiGiacomo, et al., “Building a Sustainable Business: A Guide to Developing a Business Plan for Farms and Rural Businesses,” Minnesota Institute for Sustainable Agriculture (2003), available at <http://www.misa.umn.edu/vd/bizplan.html>.

conventional commodities and specialty crops.⁵ Farms from the agriculture of the middle will be crucial to rebuilding local and regional food systems.⁶

Further research is needed regarding the technical assistance, agricultural credit, conservation assistance, marketing, and risk management tools necessary to support agriculture of the middle.⁷ The agriculture of the middle may be easier to assist in some ways (e.g., their frequently more sophisticated recordkeeping systems and farm business planning may make access to agricultural credit easier), and more difficult in others (e.g., a focus upon fewer crops and fewer buyers than is the case for more diversified smaller farms may make risk management a greater challenge.) One need of many small- and medium-sized producers that has been garnering attention is for a means to aggregate production in order to gain entry to larger markets.⁸ The 2008 Farm Bill authorizes grants to improve the cost-effective movement of specialty crops to local, regional, national, and international markets; research on how to implement this grant program (including evaluation of previous grants under the program) is needed.⁹

The Office of Small and Disadvantaged Business Utilization within USDA has launched an initiative to promote Food Commodity Contracting Opportunities for Rural America.¹⁰ The initiative is a pilot project to provide outreach and technical assistance in the form of regional conferences intended to assist small farmer-

⁵ See generally, *FOOD AND THE MID-LEVEL FARM: RENEWING AN AGRICULTURE OF THE MIDDLE*, Lyson, et al., eds. (MIT Press 2008). See also, <http://www.agofthemiddle.org>.

⁶ Day-Farnsworth, et al., “Scaling Up: Meeting the Demand for Local Food,” University of Wisconsin Center for Integrated Agricultural Systems (2009), available at <http://www.cias.wisc.edu/farm-to-fork/scaling-up-meeting-the-demand-for-local-food/>.

⁷ O’Brien, et al., *THE FARMER’S LEGAL GUIDE TO PRODUCER MARKETING ASSOCIATIONS* (Drake University Agricultural Law Center 2005). See also, Cantor and Strohlic, “Breaking Down Market Barriers for Small and Mid-Sized Organic Growers,” California Institute for Rural Studies, available at <http://www.cirsinc.org/Documents/Pub1109.1.PDF>.

⁸ For a discussion of “agile agriculture,” which is in part an effort to develop regional distribution centers to help meet this need, see <http://asc.uark.edu/323.asp>.

⁹ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title X, Subtitle D, § 10403, 122 Stat. 1651 (June 18, 2008) (codified at 7 U.S.C. § 1622c); 74 Fed. Reg. 66,274 (2009) (Notice of Funds Availability Inviting Applications for the Federal-State Marketing Improvement Program) (available funding for the NOFA was \$1.3 million). See also, the USDA Agricultural Marketing Service’s Federal State Marketing Improvement Program website at <http://www.ams.usda.gov/FSMIP>.

¹⁰ See “USDA Food Commodity Contracting Opportunities for Rural America,” USDA Office of Small and Disadvantaged Business Utilization, available at www.da.usda.gov/smallbus/WebsiteStoryBoard.htm.

owned cooperatives and small rural businesses to better navigate the complex procurement processes and compete for government and commercial procurement contracts awarded by USDA. A survey of participating farmers would likely identify many lines of further research needed.

V. AGRONOMIC PRACTICES FOR IMPROVED NUTRITION AND RESILIENCE

Prior to the 2008 Farm Bill, nongovernmental organizations had repeatedly sought to draw attention to the dearth of publicly funded agricultural research.¹¹ Farm organizations made a somewhat successful push for increased research funding in the 2008 Farm Bill. However, the authorized funding will need to be secured through the appropriations process each year, and the grants will need to be awarded in a transparent fashion. It is important that there be publicly funded research, whose goal is to serve the public good and whose ownership remains in the public domain.

More research is needed on the effect of farming practices on the nutritional value and cosmetic appearance of fruits and vegetables.¹²

In the face of frequent natural disasters and looming climate change, more research is needed to support innovation in farm management practices to make farms less susceptible to drought and flooding, and more resilient following a natural disaster.¹³

¹¹ See, e.g., “Reinvigorating Public Plant and Animal Breeding for a Sustainable Future,” Midwest Sustainable Agriculture Working Group and Sustainable Agriculture Coalition (2005), available at <http://sustainableagriculture.net/publications>; “Summit Proceedings: Seeds and Breeds for 21st Century Agriculture,” Sligh and Lauffer, eds., RAFI–USA (July 2004), available at <http://www.rafiusa.org/pubs/Seeds%20and%20Breeds.pdf>; Lipson, “Searching for the ‘O-Word’: Analyzing the USDA Current Research Information System for Pertinence to Organic Farming,” Organic Farming Research Foundation (1997), available at <http://ofrf.org/publications/o-word.html>.

¹² For example, The Organic Center has collected much of the peer-reviewed literature examining nutritional claims related to organic agriculture. See <http://www.organic-center.org>.

¹³ See Lotter, et al., “The Performance of Organic and Conventional Cropping Systems in an Extreme Climate Year,” 18 American Journal of Alternative Agriculture 146 (2003) (describing research conducted by the Rodale Institute); A WATERSHED YEAR: ANATOMY OF THE IOWA FLOODS OF 2008, Mutel, ed. (University of Iowa 2010), available for purchase at <http://uiupress.uiowa.edu/books/2010-spring/mutel-water.htm>; Boody and Krinke, “The Multiple Benefits of Agriculture: An Economic, Environmental, and Social Analysis” Land Stewardship Project (Nov. 2001), available at http://www.landstewardshipproject.org/mba/mba_report_layout_final.pdf.

VI. AGRICULTURAL LABOR LAWS

One central difference between the production of nonperishable commodities and production of fruits and vegetables is the extent to which harvesting the former is mechanized while the latter is still largely harvested by hand. Many fruit and vegetable growers, therefore, need to hire labor to assist in harvesting their crops. Many small- and medium-scale farmers report difficulty finding legal advice or guidance regarding their obligations under state and federal wage and hour laws, workers' compensation and unemployment compensation laws, and other laws dealing with hired labor on farms. Efforts to disseminate existing guidance from the U.S. Department of Labor and other federal or state agencies, as well as new research and educational materials on persistent questions, would help farmers to ensure that they are in compliance.

Issues of agricultural labor are complex and deserving of a separate report. Possible subjects to be addressed include: enforcement of labor laws in a manner that ensures that farmers who comply are not unfairly disadvantaged;¹⁴ the scope of various agricultural exemptions from labor laws; application of labor laws to family members, farm interns, and apprentices; requirements and available assistance to provide labor housing; and possible effects of immigration reform on availability of agricultural labor, and the resulting impact on availability and price of fruits and vegetables.

VII. FOOD SAFETY PRACTICES AND POLICIES

Due to recent severe outbreaks of food-borne illnesses and food product recalls, food safety issues have garnered the attention of Congress. It may seem surprising that the Farm Bill does not have a great deal to say about food safety.¹⁵ The near-silence of the Farm Bill on this topic may be explained in part by the fact that the Food and Drug Administration and USDA each exercise some authority in this realm. It is likely that new food safety laws will be passed soon. In 2009, a number of bills related to food safety were before Congress, yet none achieved final passage. Food safety issues are extremely complex and deserve much more analysis than can be provided in this report. Fruit and vegetable growers with small- and medium-size operations have expressed a number of concerns related

¹⁴ The Agricultural Justice Project seeks to go beyond assuring compliance with legal requirements, and is attempting to create standards for a "domestic fair trade" label, to include fair wages and humane working conditions for farmworkers. For more information, see <http://www.agriculturaljusticeproject.org>.

¹⁵ One relevant measure is 2008 Farm Bill § 10105, codified at 7 U.S.C. § 7655a (authorizing \$1 million for USDA to carry out food safety education initiatives targeted to the public and persons in the fresh produce industry).

to food safety laws and voluntary guidelines proposed to date.¹⁶ Because of the crucial role that these farmers will play in producing and marketing the fruits and vegetables necessary to meet the dietary needs of our nation's children, any future policy analysis or recommendation should address these expressed concerns directly.

¹⁶ *Food Safety on the Farm: Policy Brief and Recommendations* (National Sustainable Agriculture Coalition 2009), available at <http://sustainableagriculture.net/wp-content/uploads/2008/08/NSAC-Food-Safety-Policy-Brief-October-2009.pdf>; Hardesty and Kusunose, *Growers' Compliance Costs for the Leafy Greens Marketing Agreement and Other Food Safety Programs*, (University of California Small Farm Program Research Brief, 2009), available at www.sfc.ucdavis.edu/docs/foodsafety.html; Starmer and Kulick, "Bridging the Gaps: Strategies to Improve Produce Safety, Preserve Farm Diversity, and Strengthen Local Food Systems," Food and Water Watch and Institute for Agriculture and Trade Policy (2009), available at www.foodandwaterwatch.org/food/pubs/reports/bridging-the-gaps.

Chapter 10

Policy Recommendations for the Next Farm Bill

I. INTRODUCTION

The recommendations in this report are aimed at removing obstacles that impede the efforts of farmers to grow and strategically market healthy food crops, such as fruits and vegetables, in a manner that helps improve children's diets. With many farmers expressing genuine enthusiasm to be a part of a creative restructuring of our food systems, there is a wealth of opportunities for public health advocates and farmers to work together to seek necessary federal policy changes.

A basic lesson of this report has been that one must look beyond the commodity programs to understand the Farm Bill. At the same time, one must understand the ways in which the commodity programs influence other federal farm policies, from crop insurance to credit to conservation. Quite simply, USDA's detailed knowledge of commodity production and distribution, developed over several decades, pervades many farm programs. Developing a similar knowledge base on fruit and vegetable production and marketing, through research and data collection, will be essential to ensuring that changes in agriculture policy to promote production and strategic marketing of fruits and vegetable are effective in supporting the fight to end childhood obesity.

This chapter pulls together all of the recommendations for policy change discussed in the previous program chapters. For a more detailed discussion of these recommendations, see the relevant program chapters.

II. COMMODITY PROGRAMS

Chapter 2 of this report discusses the federal commodity support programs and identifies several obstacles they present to fruit and vegetable production and to a healthy foods policy in general. Recommendations for policy changes that could address these obstacles are discussed below.

- **Develop Farm Bill options for eliminating fruit and vegetable planting restrictions through strategy discussions with the various segments of the fruit and vegetable production sector.** Adequate production of fruits and vegetables to meet the nutritional needs of children will likely require lifting of the commodity program planting restrictions to permit fruits and vegetables to be grown on some acreage that historically has been enrolled in the commodity programs. Appropriate changes to the planting restriction

must begin to be implemented under the next Farm Bill if such changes are to be effective over the next decade in helping to prevent childhood obesity. Strategy discussions in anticipation of the next Farm Bill should identify the specific concerns of various segments of the fruit and vegetable production sector related to the planting restrictions, and should develop various options for changes to the planting restrictions that will address these concerns, with the goal of maximizing production of fruits and vegetables for distribution to markets that best serve vulnerable children. For example, are there targeted changes, similar to the 2008 Farm Bill's pilot project for processing vegetables in the Midwest, that would yield increased production in specific production markets or sectors where an unmet need has been identified?

Are there other focused adjustments that could be implemented on a small scale and/or in particular markets: e.g., an exception to the planting restrictions for fruits and vegetables: (1) that will be sold directly to consumers through avenues such as farmers' markets, roadside stands, you-pick operations, Internet, house-to-house, or on-farm sales; (2) that will be sold locally to schools, grocery stores, and/or restaurants; (3) that are grown by beginning farmers; or (4) that are grown by farmers transitioning to small- or medium-scale organic production? Are there ways to phase-in the elimination of the planting restrictions to attempt to ensure that demand keeps pace with increases in supplies so as to prevent any precipitant declines in prices that might threaten the viability of the farmers' fruit and vegetable operations? Are there specific exceptions to the planting restrictions that may be effectively applied nationally, while others may be more appropriate on a regional or localized basis?

- **Prior to Congressional debate on the next Farm Bill, conduct more data collection and analysis to determine effects of various changes to the fruit and vegetable planting restrictions.** To provide support for the various changes to the fruit and vegetable planting restrictions that should be made part of the next Farm Bill, there is need for more economic analysis to assist in projecting the effects various possible changes would have on the production of fruits and vegetables. Studies that have attempted to identify and quantify the effect of removing the fruit and vegetable planting restrictions have noted the need for more complete data. Analysis of different change scenarios is also needed. For example, what would be the difference in impact, if any, of permitting acre-for-acre payment reductions on all commodity program base acres planted to fruits and vegetables, rather than removing the restrictions but still making commodity program payments? What would be the impact if the planting restrictions were lifted to allow small-scale production of fruits and vegetables that will be sold directly to consumers through such avenues as farmers' markets, you-pick operations, roadside stands, Internet, or house-to-house sales; or locally to schools,

grocery stores, and restaurants? How could supply and demand conditions of particular markets be assessed to determine whether any lifting of planting restrictions should be expanded or suspended to allow for stabilization of supply and demand for fruits and vegetables in the area? However, there should be no delay in incorporating appropriate changes to the planting restrictions in the next Farm Bill, even if further economic analysis is still forthcoming. If the ideal analysis is not complete by the time of the Farm Bill debate, proceeding with incomplete knowledge may be the best way to assess how changing the planting restrictions will affect the provision of fruits and vegetables to vulnerable children. In such a case, providing a mechanism for mid-course corrections would be the best way to deal with any unexpected adverse effects of the changes.

- **Strategize with fruit and vegetable farmers about market growth opportunities in relation to opportunities for compromise on planting restrictions.** Strategy discussions among public health, consumer, and farm advocates to identify ways to increase demand for fruits and vegetables to keep pace with any increasing supplies will be crucial to the development and maintenance of strong, long-term production and marketing chains for these essential food crops. Converting even a small percentage of commodity base acres to fruit and vegetable production without increasing demand could threaten markets in the short term. According to the 2007 Census of Agriculture, about 7.7 million acres of land in the U.S. were planted to fruits and vegetables.¹ In 2009, about 255 million acres were enrolled in DCP and ACRE, the principal farm commodity programs.² Thus, a conversion of just 1 percent of commodity program base acres (roughly 2.5 million acres) would increase the number of acres planted to fruits and vegetables by nearly one-third. If this additional production were released on the market with no other changes, it seems likely that wholesale fruit and vegetable prices would drop substantially. Lower prices might seem desirable from a public health perspective in the short term, but in the long term it would likely result in some fruit and vegetable farmers ceasing production, and thus supply might well contract to previous levels. Some recommendations for increasing demand through the Farm-to-School and other federal nutrition programs are incorporated in Chapter 8.

¹ 2007 Census of Agriculture: Specialty Crops, Table 1 (2009) (reporting just over 2 million acres of noncitrus fruits, about 1 million acres of citrus fruits, about 260,000 acres of berries, and about 4.4 million acres of vegetables, potatoes, and melons), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Specialty_Crops/speccrop.pdf.

² “USDA Enrolls 255 Million Base Acres in DCP & ACRE on 1.7 Million Farms,” USDA Press Release No. 0519.09 (Oct. 20, 2009).

III. CROP INSURANCE AND DISASTER ASSISTANCE PROGRAMS

Chapter 3 of this report discusses the federal crop insurance and disaster assistance programs and how those programs could encourage fruit and vegetable production by providing better risk management tools. Specific recommendations for policy changes are discussed below.

- **Provide Non-insured Crop Disaster Assistance Program coverage equivalent to that provided by catastrophic crop insurance.** USDA should ensure that disaster assistance coverage provided for fruits, vegetables, and other specialty crops is equivalent to that provided for conventional commodity crops. Catastrophic crop insurance coverage protects up to 27.5 percent of expected income, based upon losses greater than 50 percent of expected yields at 55 percent of the expected price. Equivalent coverage for fruit and vegetable crops may require that FSA recognize different prices for farmers who direct market or sell at retail, organic farmers, and other value-added producers.

Determine needed changes to the Non-insured Crop Disaster Assistance Program (NAP) regulations so that NAP provides coverage equivalent to crop insurance at the catastrophic level. USDA or the Government Accountability Office should produce a report in 2010 and every two years thereafter detailing progress in expanding crop insurance coverage and disaster assistance protection for specialty crops in order to achieve the statutory mandate of providing equivalent coverage under NAP, as is provided by catastrophic crop insurance policies.

- **Make effective coverage in addition to catastrophic coverage available to fruit and vegetable farmers.** Congress should create additional coverage levels under NAP, for crops and/or diversified operations, where the Federal Crop Insurance Corporation may lack the actuarial data required for a permanent crop insurance policy. The additional coverage could be for an increased percentage of the average market price, an increased percentage of the approved yield, or both. This additional coverage could be used to create a more attractive NAP product than the coverage currently offered and as a means to increase farmer participation, and thus, to improve collection of price and yield data and ultimately advance the possibility of additional crop insurance policies.
- **Continue to develop and refine whole farm revenue crop insurance products.** Streamline the documentation requirements for these policies.
- **Collect and use price and yield data for specialty crops.** The central mechanism by which crop insurance and disaster assistance programs

discourage fruit and vegetable production is in their reliance upon price yields that do not correspond to the prices actually received by most fruit and vegetable farmers. There are several specific policy changes USDA should undertake to eliminate this barrier to full disaster coverage for fruit and vegetable production

- **Collect and use data by crop, type, variety, and intended use.** Direct USDA to develop and incorporate into program regulations criteria to identify distinct crops, types, varieties, and intended uses, encompassing both production and marketing practices, and to determine the “best available information” regarding price and yield. To the extent that price and yield information collected and submitted by farmers is available to FSA with a reasonable effort, consider the data submitted by farmers under the same criteria as data collected by FSA. Create a means for farmers’ market managers to report average prices at their markets.

Recognize direct marketing as a distinct intended use with significantly different prices. Base benefits for crops sold through direct marketing upon retail prices, not wholesale. Recognize the certified organic market as a distinct intended use with significantly different prices. Make completion of (and full funding for) the Organic Production and Market Data Collection Initiative a high priority.

Include full funding for comprehensive data collection (retail and wholesale, conventional and organic) in USDA budgets and appropriations requests

- **Consider best sources of relevant price and yield data.** Require USDA to make a reasonable effort to locate price and yield data available from federal and state government sources, universities, Extension, buyers and processors, local markets, and farmers’ markets before deciding on individual benefits. Compare the costs and benefits of having “best available information” collected at the local level versus at the national level.

For yield data, establish criteria which recognize that the “most representative available historical information” is the data that most closely matches the farmer’s production and marketing practices.

Request public input on the most efficient, effective, and equitable ways to collect accurate price and yield data for fruits and vegetables.

Actively solicit price and yield data from specialty crop farmers when they sign up for disaster assistance programs. Permit a farmer to

document his or her price history for a crop and receive coverage based on that history.³

- **Update reporting and recordkeeping requirements.** Recommendations for policy change that address this issue include:
 - **Adapt reporting forms.** Adapt acreage, production, and price reporting forms to accommodate fruit and vegetable crop farms, including highly diversified farms. Solicit input from state and local FSA offices and from farmers regarding crops, types, varieties, and intended uses that should be added to the NAP tables. Create an acreage reporting form that will streamline reporting by farmers who utilize succession planting and who grow dozens of crops on relatively small acreage.
 - **Amend the definition of a crop of economic significance.** For purposes of the Risk Management Purchase Requirement under the Supplemental Revenue Assistance Program (SURE), amend the definition of a “crop of economic significance” to mean crops that do or are expected to contribute 10 percent or more of total crop value, in order to avoid unduly burdening highly diversified farmers who may have many crops at or near the current 5 percent threshold.
 - **Adopt clear regulatory standards for acceptable production evidence.** Clarify or abandon the distinction regarding sale through commercial and noncommercial channels under the NAP and SURE regulations. Clarify criteria by which production evidence will be determined “reliable” in the absence of independent verification. Review and clarify crop appraisal requirements.
 - **Review criteria for disaster designations that trigger eligibility for SURE and Emergency Loans.** Adopt and publicize regulations that instruct state and local FSA offices to consider whether a disaster designation may be warranted when there is significant damage to many small-scale and highly diversified fruit and vegetable farms, even if no single “major crop” suffered a 30 percent loss.
 - **Create a “low documentation” option under NAP.** Create a “low documentation” option under NAP, similar to the “low documentation” approach in the FSA loan programs, to reduce the recordkeeping requirements for small farmers. Consider the use of self-certification of prices and yields as one element of a low documentation option.

³ The Risk Management Agency has several promising pilot projects to provide crop insurance coverage based upon “Actual Revenue History (ARH).” See Final Resolution (strawberries), available at <http://www.rma.usda.gov/fcic/2009/312strawberry.pdf>.

- **Provide processes that are participatory, transparent, and fair for the development and implementation of Supplemental Disaster Assistance Programs.** Recommendations for policy change that address this issue include:
 - **Recognize NAD’s statutory authority.** For the benefit of subordinate agencies that often ignore it, USDA should reaffirm the National Appeals Division’s authority to make decisions on appealability and require those agencies to promptly implement NAD decisions. Recognize farmers’ right to appeal the application of average market prices, transition yields, county average yields, and approved yields established under NAP to their individual cases. Appeals are of special importance for fruit and vegetable farmers, whose local USDA officials, due to limited experience with fruit and vegetable operations, may not properly account for the unique character of these types of farms.
 - **Engage in full notice and comment rulemaking under the next Farm Bill.** Notice and comment rulemaking enables the public to weigh in on proposed regulations before they are adopted by a government agency.⁴ The practice of exempting ad hoc disaster assistance programs from notice and comment rulemaking produces unnecessarily confusing and ambiguous regulations, resulting in less effective programs, especially with respect to issues of concern to fruit and vegetable growers.
 - **Provide fair and equitable coverage to farmers not participating in yield-based crop insurance or NAP.** Tailor disaster assistance to the type of farming operation, including those operations growing fruit and vegetable crops, and strive to balance efficiency and equity when providing SURE coverage.
 - **Provide equal access to FSA programs.** Develop and implement a plan to provide access to USDA disaster assistance programs on an equal basis to persons who have limited proficiency in English. This is especially critical for immigrant and non-English speaking farmers, who disproportionately grow fruits and vegetables. Provide equal access to USDA programs for farm operators as that provided to farm owners.
 - **Provide incentives for good farming practices.** Farmers who utilize farming practices (such as crop diversification, crop rotation, soil conservation, and crop type and variety selection) that increase resilience in the face of natural disaster and climate change should receive

⁴ Where time is of the essence, an interim final rule may be published, allowing for rapid program implementation, yet still providing some opportunity for public participation.

enhanced crop insurance and disaster assistance payments, rather than suffer penalties.

IV. AGRICULTURE LOAN PROGRAMS

Chapter 4 of this report discusses the agriculture loan programs and how those programs could be improved to be more supportive of fruit and vegetable production. Specific recommendations for policy changes that would help make federal Farm Service Agency (FSA) loan programs more accessible to fruit and vegetable farmers are listed below.

- **Increase appropriations.** Encourage Congress to continue increases in appropriations for the full range of FSA direct and guaranteed loan programs.
- **Collect and publish information on fruit and vegetable farmers' access to loan programs.** Direct FSA, for each and every direct and guaranteed loan category, to track the number of loan applications, loan approvals, loan denials, and loan amounts for fruit and vegetable farmers, by size of operation and type of marketing channel. FSA should provide reasons for denials of loans and identify policy obstacles that prevented these farmers from obtaining FSA direct or guaranteed loans. This information will be essential in determining the effectiveness of these programs in promoting healthy food production and marketing.
- **Collect and publish fruit and vegetable price and yield information.** Direct USDA to collect and publish more detailed information on a local or regional basis on prices paid and yields obtained for the wide range of fruits and vegetables sold through direct marketing channels, including farmers' markets and Internet sales to consumers; community supported agriculture farms; and direct sales to grocery stores, restaurants, schools, and other institutions, in order to assist FSA in its assessment of farm plan feasibility in the loan approval process.
- **Amend regulations and policies to ease price and yield projections for direct-market fruits and vegetables.** Direct FSA to make any necessary amendments to regulations or policies to accommodate easier farm plan development and assessment, including crop price and yield figures, for farmers growing multiple fruits and vegetables for sale through direct marketing channels, including those channels that do not involve advance written contracts for the sale of produce (e.g., farmers' markets, road side stands, house-to house, and Internet sales directly to consumers).
- **Streamline farm planning and reporting forms.** Direct FSA to develop farm plan forms and recordkeeping or reporting documents that are better suited to farmers who grow numerous different fruit and vegetable crops to facilitate loan applications and reporting requirements for these farmers.

- **Train staff and guaranteed loan lenders.** Direct FSA to develop or acquire training materials and programs for its county and state office staff that provide information on: (1) emerging markets for fruit and vegetable farmers, including the broad range of direct marketing channels; (2) how to assist such farmers to complete loan application and recordkeeping and reporting documents for FSA loans; (3) steps the FSA staff are expected to take to provide the extra technical assistance needed to assist these farmers with loan applications and loan agreement compliance; (4) how FSA will evaluate farm plan feasibility in the loan approval process for these farmers; and (5) steps to take to ensure that immigrant farmers who may have language barriers are provided the necessary assistance in the loan application and loan agreement compliance processes. FSA should mandate that appropriate county and state office personnel attend such trainings and invite lenders using the guaranteed loan program to send appropriate representatives.
- **Provide more technical assistance on loan application process.** Direct FSA staff to provide a higher degree of technical assistance in preparing and completing loan applications to fruit and vegetable farmers in order to promote increased lending to these farmers.
- **Target outreach and technical assistance funding.** Direct USDA to target funding to and/or prioritize projects under outreach and technical assistance programs, e.g., the Outreach and Technical Assistance for Socially Disadvantaged Farmers and Ranchers Program, to providing farm management, financial management, and/or marketing technical assistance to fruit and vegetable farmers, especially farmers selling through direct marketing channels.

V. CONSERVATION PROGRAMS

Chapter 5 of this report discusses the agricultural conservation programs and how those programs could be improved to be more supportive of fruit and vegetable production. Specific recommendations for policy changes that would help make federal conservation programs more accessible to fruit and vegetable farmers are listed below.

- **Increase funding and technical support for working lands programs.** Encourage Congress to continue the trend from the 2002 and 2008 Farm Bills to increase funding and technical support for working lands conservation programs.
- **Recruit fruit and vegetable farmers to be on committees setting program priorities.** Recruit fruit and vegetable farmers, both large- and small-scale, to participate in Natural Resource Conservation Service (NRCS) State Technical Committees and Local Working Groups.

- **Increase fruit and vegetable production pilot conservation projects.** Increase the number and scope of pilot projects designed to verify and measure the conservation benefits from: (1) standard conservation practices applied in the context of fruit and vegetable production; and (2) conservation practices unique to fruit and vegetable production. Pilot projects that provide both financial and technical assistance could be conducted under the Cooperative Conservation Partnership Initiative and through CSP on-farm research and demonstration projects.
- **Adjust priority ranking of conservation practices used by fruit and vegetable farmers.** Based on the results from the pilot projects above and from other investigations, adjust as appropriate at national, state, and local levels the weight given in the ranking system to particular conservation practices in fruit and vegetable production and the financial assistance available for implementing those practices.
- **Train staff and consultants to provide targeted assistance to fruit and vegetable farmers.** Train all NRCS staff and technical assistance consultants how to provide assistance to fruit and vegetable operations. Training should be nationwide, not limited to areas where pilot programs are running. Training of NRCS staff should address both in-the-field conservation technical assistance and assistance with documentation, planning, and preparing program applications.
- **Recruit fruit and vegetable conservation specialists.** Recruit conservation specialists with expertise in fruit and vegetable production to be partners in the Conservation Technical Assistance program.
- **Conduct outreach to fruit and vegetable farmers.** Conduct comprehensive outreach to fruit and vegetable farmers to inform them of the financial and technical benefits available through the various conservation programs.
- **Remove the statutory provision directing the majority of EQIP dollars to livestock operations.** Eliminate the provision that directs 60 percent of Environmental Quality Incentives Program (EQIP) funds to livestock operations.

VI. USDA RESEARCH PROGRAMS

Chapter 6 of this report discusses USDA research programs that are of particular importance to fruit and vegetable production. Specific recommendations for policy changes that would help make federal agriculture research programs more relevant and accessible to fruit and vegetable farmers are listed below.

- **Increase research funding for fruit and vegetable crops.** Maintain or increase funding target levels for specialty crop research initiatives,

particularly those geared toward fruit and vegetable production and strategic marketing of these crops to populations experiencing excessive levels of childhood obesity. Ensure that the research needs of farmers operating at different scales of production, from small to mid-sized to large, are addressed. Prioritize research to improve sustainability of fruit and vegetable crop production, especially with respect to reducing resource consumption, reducing pesticide use, and increasing resilience to natural disaster and climate change.

- **Devote research resources to organic and specialty crop production, including evaluation of current research and promotion efforts.** Resurrect and strengthen Congress’s instruction to USDA to devote research resources to organic and specialty crop production in amounts that are proportionate to, or exceed, those crops’ share of agricultural production. Evaluate the role of marketing orders and research and promotion programs in encouraging or discouraging sustainable production of fruits and vegetables. For example, to what extent do cosmetic standards contribute to waste and farming practices that may unnecessarily endanger farmworkers and the public health?
- **Appropriately direct research needs for the different fruit and vegetable crops.** Analyze research and data collection needs for different types of fruits and vegetables (e.g., citrus fruits, leafy greens, potatoes, and onions) and other categories of specialty crops to determine specific research priorities for different crops. For example, disease management might be the biggest research need for tree fruits while farmers growing leafy greens are clamoring for cost-effective fresh storage options and berry farmers are particularly interested in new mechanization that can reduce labor needs.
- **Collect and publish comprehensive data on fruit and vegetable production.** Undertake directly or through grants to state-level organizations—e.g., land grant universities—comprehensive data collection on specialty crop market prices for all relevant markets including wholesale, retail, and direct market sales, production yields, input requirements and expenses, and other information that farmers need to participate in the federal conservation and disaster assistance programs on a comparable basis to commodity crop farmers.

VII. RURAL DEVELOPMENT, OUTREACH, AND BEGINNING FARMER AND RANCHER DEVELOPMENT PROGRAMS

Chapter 7 of this report discusses how the rural development, outreach, and beginning farmer programs can support increased fruit and vegetable production. Specific recommendations for policy changes that would help make rural

development, outreach, and beginning farmer programs more accessible to fruit and vegetable farmers are listed below.

- **Increase funding and program support.** Continue, and consider increasing, financial and program support for the development and outreach programs.
- **Conduct research to quantify participation and benefits.** Conduct economic research to quantify the extent to which fruit and vegetable farmers are participating in and benefitting from the development and outreach programs.
- **Target development and outreach programs.** Consider further targeting of the development and outreach programs to fruit and vegetable production and marketing, as in the Local and Regional Food Enterprise emphasis for the Business & Industry Guaranteed Loan program.

VIII. NUTRITION PROGRAMS

Chapter 8 of this report describes the federal nutrition programs and discusses their role in encouraging fruit and vegetable production. Recommendations for policy changes that would help make nutrition programs more accessible markets for fruit and vegetable farmers are listed below for each specific type of program.

A. WIC and Senior Farmers' Market Nutrition Programs and WIC Fruit and Vegetable Vouchers

The Special Supplemental Nutrition Program for Women, Infants, and Children Farmers' Market Nutrition Program (WIC FMNP) and the Senior Farmers' Market Nutrition Program (Senior FMNP) could be improved by:

- Increasing overall funding and individual benefit levels.
- Working to integrate WIC FMNP with the new WIC fruit and vegetable benefit.
- Anticipating and aiding the transition to electronic benefit transfer (EBT) to reduce the financial burden on farmers and encourage more farmers to participate.
- Adopting innovations from the Senior FMNP—to the WIC FMNP—including the practices of authorizing community supported agriculture farms as vendors and allowing alternatives to face-to-face training for farmer vendors.
- Reviewing bulk purchasing practices to ensure the purposes of the programs are served and purchases are made fairly.

- Increasing communication between the FMNP agency and the WIC agency, and communicating the responsibilities of each agency clearly to farmer vendors and recipients.

The Community Food Security Coalition published a report and recommendations regarding the new WIC produce package.⁵ Their recommendations include the following:

- Plan pro-actively for farmers' markets in the rollout of EBT for WIC.
- Encourage states to allow farmers' markets as vendors when implementing new WIC rules.
- Explore ways in which WIC clients not participating in the FMNP can receive similar education and information about farmers' markets.
- Explore the connections between the use of SNAP, WIC, FMNP, and Senior FMNP benefits at farmers' markets to maximize coordination and synergies.
- Explore the long-term integration of FMNP and WIC with the aim of increasing the total dollar value of federal funds flowing to farmers' markets.

B. Supplemental Nutrition Assistance Program (SNAP)

The Supplemental Nutrition Assistance Program (SNAP) could be improved by:

- Increasing funding, education, and technical assistance for farmers' markets to adopt the use of Electronic Benefit Transfer (EBT).
- Increasing education and outreach to SNAP recipients and vendors regarding the option to use SNAP to purchase seeds and plants.
- Revising regulations prohibiting discrimination against SNAP recipients to allow the use of incentives to encourage use of SNAP benefits to purchase fresh fruits and vegetables. In the interim, the Food and Nutrition Service should aggressively publicize the possibility of and streamline the process for becoming a demonstration project for using incentives to purchase fruits and vegetables.
- Using a substantial percentage of remaining Healthy Incentives Program (HIP) funds for incentives to purchase fruits and vegetables at farmers' markets.

⁵ Tessman and Fisher, "State Implementation of the New WIC Produce Package: Opportunities and Barriers to WIC Clients to Use Their Benefits at Farmers' Markets," Community Food Security Coalition (2009), available at <http://www.foodsecurity.org/pubs.html#WIC>.

- Adding a definition for “demonstration project” to the general definitions for SNAP in 7 C.F.R. § 271.2, and including information about demonstration projects in outreach and education about SNAP. Definitions could also be added for research and evaluation projects.
- Conducting pilot projects to limit use of SNAP to staple foods. Research should be conducted into likely economic and behavioral effects of prohibiting use of SNAP for accessory foods, including candy and soda pop.

C. Federal Procurement of Agricultural Commodities

Recommendations for improving federal procurement of agricultural commodities include:

- **Continue and expand efforts to provide technical assistance and networking opportunities** to small farmer cooperatives and rural businesses to help them to compete for federal contracts.
- **Examine the process by which USDA determines which agricultural crops, in which form, to procure.** Ensure that the decisions serve both goals of most nutrition programs—providing improved nutrition to low-income persons and persons who are nutritionally at risk and providing markets for agricultural crops produced by U.S. farmers. Incorporate preferences for local food in all USDA procurement under the National School Lunch Act (NSLA), the Child Nutrition Act (CNA), and all other programs where the authorizing statute does not prohibit it.

D. Farm to School Programs

Recommendations for policy change in the Farm to School Programs include:

- **Direct purchasing from local farmers.** School districts should be encouraged to purchase vegetables and fruits directly from local farmers where possible. Direct purchasing from farmers could yield multiple benefits, including: reducing costs to schools, increasing profits to local farmers, establishing relationships between farmers and schools, and creating a sense of community.
- **Hire school district “procurer.”** In order to establish relationships with farmers, school districts should have a “procurer” within the district whose duty it is to conduct outreach to the local farming community in order to source healthy fruits and vegetables for the district. This position would be akin to community banking officers within banks.
- **Increase school reimbursement rates.** School reimbursement rates should be increased for those schools engaged in direct purchasing of fresh, locally

produced fruits and vegetables to ensure they are able to purchase high-quality produce and to encourage local fruit and vegetable farmers to enter into contracts to sell directly to school districts.

- **Offer farmers affordable insurance.** To help overcome some of the risk management issues that arise in schools contracting directly with farmers, USDA should work with its preferred insurance vendors to offer an affordable insurance product that would be offered to farmers who sell directly to schools.
- **Provide training.** USDA should establish a program to create a private/public partnership that could engage local and regional experts to provide education and training for food service staff regarding food handling procedures for fresh fruits and vegetables, incorporation of seasonal fresh fruits and vegetables into menu planning, and the development of recipes using the fresh, locally produced fruits and vegetables that are available at different points in growing seasons. These partnerships could include state Extension agents and local chefs, among others.
- **Establish and coordinate a clearinghouse for healthy eating curricula.** The long-term success of Farm to School programs requires not just providing healthy, fresh, locally produced fruits and vegetables. It also means changing the eating behaviors of children and youth in schools and will necessarily require a curriculum component that teaches about healthy foods and healthy eating. In collaboration with the Department of Education and the schools that are implementing Farm to School programs, USDA should establish a clearinghouse that collects those educational materials and makes them publicly available.
- **Encourage connections through culturally specific foods.** In its outreach program, USDA prioritizes funding for projects that link local farmers who grow culturally specific fruits and vegetables with schools that serve the students from the same cultural background. The same program could fund community-based programs that educate families about health and nutrition.

IX. RESEARCH PRIORITIES TO PREPARE FOR THE NEXT FARM BILL

In addition to the recommendations made above, Chapter 9 briefly discusses areas where we recommend further research to inform policy discussion. The broad research categories discussed in that chapter include:

- Economic research: crop prices and yields
- Specialty crop insurance
- Farm business recordkeeping systems

- Agriculture of the middle and building infrastructure for distribution of fruits and vegetables
- Agronomic practices for improved nutrition and resilience in the face of natural disaster
- Agricultural labor laws
- Food safety practices and policies

X. CONCLUSION

We urge consideration, discussion, and adoption of the foregoing recommendations. We believe they will reduce barriers to farmers seeking to produce and distribute healthy fruits and vegetables, and help speed the development of new food systems that are better aligned with the 2005 Dietary Guidelines for Americans and provide more predictable, empirically sound, and effective support for America's family farmers.



Planting the Seeds for Public Health

How the Farm Bill Can Help Farmers
to Produce and Distribute Healthy Foods

FLAG



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