

Farmers' Guide to Disaster Assistance

Volume 4: Emergency Loans

September 2019



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Farm Service Agency (FSA) Emergency (EM) Loans

I. Introduction

The Farm Service Agency (FSA) provides relief for farmer disaster victims in the form of low interest loans, called Emergency (EM) loans. EM loans are a type of FSA direct farm loans and are intended to enable farmers to return to their normal farming operations as soon as possible after an official disaster has been declared.

This Volume of the Farmers' Guide to Disaster Assistance is current through August 15, 2019.

II. Rules for EM Loans

FSA's administration of the EM loan program is governed by federal statutes and by official regulations published in the Code of Federal Regulations (CFR).¹ In addition to regulations, FSA has issued a Handbook setting out EM loan program requirements for state and county offices to use when handling EM loan applications.² This Guide explains the EM loan program requirements under the current statute, rule, and Handbook rules.

III. EM Loan Deadlines

An EM loan application must be received by FSA no later than eight months after the date a disaster is officially declared or designated.³ This declaration or designation date may vary from county to county.

If a county has been designated or named as a disaster county more than once for the same disaster, farmers will have eight months from the most recent designation to submit an EM loan application.⁴

IV. 2018 Farm Bill Changes to EM Loan Program

The 2018 Farm Bill—technically the Agricultural Improvement Act of 2018—became law on December 20, 2018.⁵ It made two changes to the EM loan program.

First, the 2018 Farm Bill expanded EM loan eligibility to those farmers who have previously received a debt write-down or restructuring of a farm loan.⁶ In the past, these farmers were ineligible for EM loans.

Second, equitable relief may now be granted for EM loans when the farmer—acting in good faith—fails to meet the terms of the loan due to the action or advice of an FSA employee.⁷

¹ EM loans are authorized by 7 U.S.C. §§ 1961-1970. Regulations are at 7 C.F.R. part 764 (2019).

² The handbook that FSA uses is called Direct Loanmaking, 3-FLP (Rev. 2) (June 21, 2019). A copy of the FSA Direct Loanmaking Handbook can be found here: <https://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk>.

³ 7 U.S.C. § 1961(a); 7 C.F.R. § 764.352(g) (2019).

⁴ Direct Loanmaking Handbook, page 10-12, para. 242.H (June 21, 2019).

⁵ Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (Dec. 20, 2018).

⁶ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 5307(3) (2018) (codified at 7 U.S.C. § 2008h(b)(2)(B)(ii)).

⁷ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 5305(b) (2018) (codified at 7 U.S.C. § 2008a).

Both of these changes are included in the discussion below.

V. Farmer Eligibility for EM Loans

EM loans are available to farmers, ranchers, and aquaculture producers who meet all of the following eligibility requirements.⁸

EM Loan Eligibility Criteria

To qualify for an EM loan, the farmer must:

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

A. Operate a Family Farm in a Disaster Area

EM loans are only available to a borrower who operates a family farm in a disaster area.⁹

1. Owner-Operator or Tenant-Operator

An EM loan borrower must be the operator of the farm affected by the disaster.¹⁰ The borrower must also have an ownership interest in any chattel that will be the basis for a loss claim.¹¹

In general, chattel property is personal property.¹² On farms this would mean almost all property that is not real estate. For FSA, chattel security includes things like crops, livestock, equipment, inventory, and supplies.¹³

⁸ Under the current EM loan regulations, delinquency on other FSA loans is no longer a bar to EM loan eligibility. 7 C.F.R. § 764.101(f) (2019).

⁹ 7 C.F.R. §§ 764.352(b), (c), (j), 764.101(k)(1) (2019).

¹⁰ 7 C.F.R. § 764.352(c) (2019). This rule applies to borrowers that are business entities. 7 C.F.R. §§ 764.101(k)(2), (l), 764.352(c)(3) (2019).

¹¹ Direct Loanmaking Handbook, page 10-9, para. 242.D (June 21, 2019).

¹² Black's Law Dictionary (4th ed. 1951).

¹³ Direct Loanmaking Handbook, exhibit 2, page 4, "Chattel security" (June 21, 2019).

If the loan proceeds are going to be used for repair or replacement of real estate, the borrower also must either be the owner of the farming operation or have a lease on the real estate meeting certain requirements.¹⁴ These requirements are: (1) the lease must go beyond the loan repayment term; (2) the lease must provide that FSA will receive prior notice of lease termination during the term of the loan; and (3) the landlord must give FSA a mortgage on the real estate as security for the loan.

2. Family Farm

An EM loan borrower's operation must qualify as a family farm.¹⁵ The FSA definition of family farm has four parts.

First, the farm must produce enough agricultural commodities for sale to be recognized as a farm rather than a rural residence.¹⁶

Second, the farm must be managed by the farmer or the farmer's family.¹⁷ The majority of the day-to-day operational decisions, and all strategic management decisions, must be made by the farmer or members of the farmer's family.¹⁸ If consultants, advisors, and similar experts are used, someone in the farm family must remain the decision maker.¹⁹

Third, the farmer and his or her family must provide a substantial part of the farm's labor requirements.²⁰ The farm may use a reasonable amount of temporary labor for seasonal peak periods or intermittent labor-intensive activities and still qualify as a family farm, so long as any full-time hired labor is only supplementing the family labor.²¹ In most instances, the family should provide most of the day-to-day labor, with exceptions recognized for high-value, labor-intensive crops such as fruit or vegetables.²²

Fourth, FSA will consider credit needs when determining whether a farm qualifies as a family farm.²³ FSA loan limits established by Congress generally ensure that the loans are made to family farm operations. The FSA Handbook says that if FSA farm loans are

¹⁴ 7 C.F.R. § 764.352(c)(1)(ii) (2019); Direct Loanmaking Handbook, page 10-9, para. 242.D (June 21, 2019).

¹⁵ 7 C.F.R. § 764.101(k) (2019). This rule applies to borrowers that are business entities. 7 C.F.R. § 764.101(k)(2), (4) (2019); Direct Loanmaking Handbook, page 4-14, para. 71.A (June 21, 2019).

¹⁶ 7 C.F.R. § 761.2, "Family farm (1)" (2019); Direct Loanmaking Handbook, Exhibit 2, page 10, "Family Farm" (June 21, 2019).

¹⁷ 7 C.F.R. § 761.2, "Family farm (2)(i)(A)" (2019); Direct Loanmaking Handbook, Exhibit 2, page 10, "Family Farm" (June 21, 2019). Family for this purpose means people who are either related to the borrower by blood or marriage, or are a relative, 7 C.F.R. § 761.2(2)(i)(A) (2019).

¹⁸ If the borrower is a business entity, the farm must be managed by the members of the entity who are responsible for operating the farm. 7 C.F.R. § 761.2, "Family farm (2)(i)(B)" (2019).

¹⁹ Direct Loanmaking Handbook, page 4-15, para. 71.B (June 21, 2019).

²⁰ 7 C.F.R. § 761.2, "Family farm (2)(ii)(A)" (2019); Direct Loanmaking Handbook, Exhibit 2, page 10, "Family Farm" (June 21, 2019). If the borrower is a business entity, a substantial part of the farm's labor requirements must be provided by the members of the entity responsible for operating the farm. 7 C.F.R. § 761.2, "Family farm (2)(ii)(B)" (2019).

²¹ 7 C.F.R. § 761.2 "Family farm (3), (4)" (2019); Direct Loanmaking Handbook, Exhibit 2, page 10, "Family Farm" (June 21, 2019).

²² Direct Loanmaking Handbook, page 4-15, para. 71.B (June 21, 2019).

²³ Direct Loanmaking Handbook, page 4-15, para. 71.B (June 21, 2019).

only a small portion of the farmer's total credit requirements, it may indicate to FSA that the farm is larger than family-size or that credit would be available from another source.

3. In an Official Disaster Area

EM loans are only available for losses to a farming operation located in a disaster area.²⁴ For EM loan purposes, a disaster area is any county declared or designated a disaster for EM loan assistance.²⁵ All counties bordering the declared or designated county also qualify as disaster areas. This means that to be eligible for an EM loan, a farmer must operate in a county that is a declared or designated disaster county, or any county that borders a disaster county.

4. Cannot Operate Enterprises that are NOT Eligible for EM Loans

EM loans are not available for losses to non-eligible enterprises.²⁶ FSA defines non-eligible enterprises as enterprises that: (1) raise exotic animals or their products; (2) raise non-farm animals (for example, animals ordinarily used as pets); (3) market goods or services that are not produced by the farming operation; or (4) process or market farm products, the majority of which were not produced by the farming operation.²⁷

B. Established Family Farmer Intending to Continue Farming

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

1. Established Farmer

The borrower must be an established farmer.²⁸ FSA defines established farmer as a farmer who operates a farm and meets the following three requirements: (1) was actively participating in the operation and management of the farm at the time of the disaster;²⁹ (2) spends a substantial portion of time carrying out the farming operation; and (3) planted the crops or produced the livestock on the farm.³⁰

To qualify as an established farmer, the farmer cannot operate certain types of farms. Operations not eligible for an EM loan are: (1) integrated livestock, poultry, or fish processing operations, where the farmer—as the processor—operates the business

²⁴ 7 C.F.R. § 764.352(g) (2019); Direct Loanmaking Handbook, page 10-12, para. 242.H (June 21, 2019).

²⁵ 7 C.F.R. § 761.2, “Disaster area” (2019); Direct Loanmaking Handbook, Exhibit 2, page 7, “Disaster Area” (June 21, 2019).

²⁶ 7 C.F.R. § 764.102(f) (2019); Direct Loanmaking Handbook, page 4-20, para. 74.A (June 21, 2019).

²⁷ 7 C.F.R. § 761.2, “Non-eligible enterprise” (2019); Direct Loanmaking Handbook, Exhibit 2, page 15, “Non-Eligible Enterprise” (June 21, 2019).

²⁸ 7 C.F.R. § 764.352(b) (2019).

²⁹ Active participation includes exercising control over the farming operation, making decisions regarding the operation, and establishing the direction of the operation. 7 C.F.R. § 761.2, “Established farmer (1)” (2019).

³⁰ 7 C.F.R. § 761.2, “Established farmer (1)-(3)” (2019); Direct Loanmaking Handbook, Exhibit 2, page 9, “Established Farmer” (June 21, 2019). If the farm is operated by a business entity, the entity owners, as a group, must satisfy the established farmer requirements.

through contracts or other arrangements with farmers; (2) any farming operation that employs a full-time farm manager; and (3) nonprofits and estates.³¹

Although integrated processors are not eligible for EM loans, a grower under contract with an integrated processor may be considered an established farmer for EM loan purposes so long as the grower does not employ an outside full-time manager or management service.³² EM loans made to such a grower will be based on the grower's share in the agricultural production, as provided for in the contract with the processor.

In addition to meeting the above requirements, if the borrower is a business entity, the entity must be primarily engaged in farming, and more than 50 percent of its gross income from all sources must be from the farming operation, based on a projected cash flow.³³

2. Intend to Continue Farming

EM loan borrowers must demonstrate the intent to continue the farming operation after the disaster.³⁴ Farmers who temporarily stopped farming because of the disaster should be able to satisfy this eligibility requirement if they intend to resume farming.

C. Managerial Ability

In order to be eligible for an EM loan, a farmer must have sufficient managerial ability to ensure reasonable prospects of repaying the loan, as determined by FSA.³⁵ Managerial ability must be demonstrated by education, on-the-job training, or farming experience that covered at least one entire production cycle in the previous five years.

D. Acceptable Credit History

A farmer must demonstrate an acceptable credit history to be eligible for any FSA direct farm loan, including an EM loan.³⁶ The regulations state that FSA will use a farmer's prior record of debt repayment to evaluate the farmer's credit history.³⁷

1. Truthful Credit Information and History of Fulfilling Credit Obligations

Part of the credit history consideration is whether the farmer has dealt in good faith with FSA in the past, including providing current, complete, and truthful information

³¹ 7 C.F.R. § 761.2, "Established farmer (5)-(6)," "Entity" (2019); Direct Loanmaking Handbook, Exhibit 2, page 8, "Entity" (June 21, 2019).

³² 7 C.F.R. § 761.2, "Established farmer (5)" (2019); Direct Loanmaking Handbook, Exhibit 2, page 9, "Established Farmer" (June 21, 2019).

³³ 7 C.F.R. § 761.2, "Established farmer (4)" (2019); Direct Loanmaking Handbook, Exhibit 2, page 9, "Established Farmer" (June 21, 2019).

³⁴ 7 C.F.R. § 764.352(d) (2019); Direct Loanmaking Handbook, page 10-10, para. 242.E (June 21, 2019).

³⁵ 7 C.F.R. § 764.101(i) (2019); Direct Loanmaking Handbook, pages 4-12 through 4-14, para. 69.A (June 21, 2019).

³⁶ 7 C.F.R. § 764.101(d) (2019); Direct Loanmaking Handbook, pages 4-5 through 4-8.5, para. 65 (June 21, 2019).

³⁷ 7 C.F.R. § 764.101(d) (2019); Direct Loanmaking Handbook, pages 4-7 through 4-8.5, para. 65.D (June 21, 2019).

in the EM loan application and in all past dealings with FSA.³⁸ Good faith also includes satisfying all written agreements with FSA. If a farmer fails to satisfy written agreements with FSA because of circumstances beyond the farmer's control, the farmer will still be considered to have acted in good faith.³⁹

FSA may determine that farmers have not acted in good faith if they deliberately falsify information, intentionally omit information relevant to the loan decision, or do not make every reasonable effort to meet the terms and conditions of the proposed loan.⁴⁰ FSA will also examine whether the farmer has fulfilled his or her obligations to other parties, including other federal agencies.⁴¹ A history of failures to repay debts when the ability to repay was within the farmer's control will generally be considered an unacceptable credit history.⁴²

2. Certain Credit Problems Are Not Necessarily Unacceptable

General FSA regulations applicable to all FSA direct farm loan programs state that certain problems in making past payments do not automatically indicate an unacceptable credit history.⁴³ These include the following.

a. More Than Three Years Ago

Foreclosures, judgments, or delinquent payments that occurred more than thirty-six months before the EM loan application is filed do not automatically constitute an unacceptable credit history if no similar situations have occurred recently.⁴⁴

b. Resolved Through FSA Loan Servicing

Delinquencies on FSA debt that have been resolved through loan servicing do not mean that the farmer has an unacceptable credit history.⁴⁵

c. Isolated Incidents

Isolated incidents of delinquent payments that do not represent a general pattern of unsatisfactory or slow payment do not mean that the farmer has an unacceptable credit history.⁴⁶

³⁸ 7 C.F.R. §§ 764.101(d)(1), 761.2, "Good faith" (2019); Direct Loanmaking Handbook, page 4-5, para. 65.A (June 21, 2019). When determining whether a farmer acted in good faith, FSA will only consider fraud, waste, or conversion actions if those actions are substantiated by a written legal opinion issued by the Office of the General Counsel.

³⁹ 7 C.F.R. § 761.2, "Good faith" (2019).

⁴⁰ Direct Loanmaking Handbook, page 4-5, para. 65.A (June 21, 2019).

⁴¹ 7 C.F.R. § 764.101(d)(1) (2019).

⁴² 7 C.F.R. § 764.101(d)(3) (2019).

⁴³ 7 C.F.R. § 764.101(d)(3) (2019); Direct Loanmaking Handbook, pages 4-7 through 4-8, para. 65.D (June 21, 2019).

⁴⁴ 7 C.F.R. § 764.101(d)(3)(i) (2019).

⁴⁵ 7 C.F.R. § 764.101(d)(3)(i) (2019). This applies to delinquencies that are resolved through FSA's loan servicing programs available under 7 C.F.R. part 766.

⁴⁶ 7 C.F.R. § 764.101(d)(3)(ii) (2019).

d. Lack of Credit History

A lack of credit history does not mean the farmer has an unacceptable credit history.⁴⁷

e. Circumstances Beyond the Farmer's Control

A recent foreclosure, judgment, bankruptcy, or delinquent payment does not mean the farmer has an unacceptable credit history if the circumstances causing it were temporary and beyond the farmer's control.⁴⁸

f. Justifiable Dispute About Goods or Services

A recent foreclosure, judgment, bankruptcy, or delinquent payment does not mean the farmer has an unacceptable credit history if the farmer refused to make full payment due to defective goods or services or based on another justifiable dispute relating to the goods or services purchased.⁴⁹

E. Unable to Get Credit Elsewhere

EM loan borrowers must be unable to get sufficient credit elsewhere at reasonable rates and terms.⁵⁰ A farmer's ability to obtain credit for the farming operation through credit cards, finance companies, or other "sub-prime" lenders does not constitute failure of the no-credit-elsewhere test, unless the rates and terms for that credit are similar to the rates and terms offered by other agricultural lenders in the community on loans for farm purposes.⁵¹

Farmers must be able to document their inability to get sufficient credit elsewhere.⁵² As described below, the type of documentation required will vary depending on the amount of the farmer's EM loan. FSA can also contact lenders in the area and make an independent determination of the farmer's ability to obtain credit elsewhere.⁵³

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

If the farmer is requesting a loan of more than \$300,000, the farmer must provide written loan denials from two commercial lending institutions located near the farmer.⁵⁴ The reason for the denial must be specified. One of the denials must be from

⁴⁷ 7 C.F.R. § 764.101(d)(3)(iii) (2019).

⁴⁸ 7 C.F.R. § 764.101(d)(3)(iv) (2019). FSA will consider isolated delinquent payments due to unforeseen medical expenses as being beyond the farmer's control. Direct Loanmaking Handbook, page 4-8, para. 65.D (June 21, 2019).

⁴⁹ 7 C.F.R. § 764.101(d)(3)(iv) (2019).

⁵⁰ 7 C.F.R. §§ 764.101(e), 764.352(e) (2019); Direct Loanmaking Handbook, page 10-10, para. 242.F (June 21, 2019).

⁵¹ Direct Loanmaking Handbook, page 10-11, para. 242.F (June 21, 2019).

⁵² 7 C.F.R. § 764.352(e) (2019); Direct Loanmaking Handbook, page 10-10, para. 242.F (June 21, 2019).

⁵³ 7 C.F.R. § 764.352(e)(4) (2019); Direct Loanmaking Handbook, page 10-11, para. 242.F (June 21, 2019).

⁵⁴ 7 C.F.R. § 764.352(e)(1) (2019); Direct Loanmaking Handbook, page 10-10, para. 242.F (June 21, 2019).

the farmer's normal lender, and both denials must be from lenders who typically make farm loans.⁵⁵

2. Application to Borrow \$300,000 or less: One Written Denial

If the application is for \$300,000 or less, the farmer must provide a written loan denial from one commercial lending institution located near the farmer.⁵⁶ The reason for the denial must be specified. The farmer must contact his or her normal lender unless that lender has already denied a request to continue with the farmer or extend additional credit with or without a guarantee.⁵⁷ In that case, the farmer may contact another lender that makes agricultural loans.

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

For loans of \$100,000 or less, FSA may waive the requirement for a written denial of credit if certain conditions are met.⁵⁸ In order for the waiver to be available, FSA must conclude that obtaining the written denial would pose an undue burden on the farmer, the farmer must certify that credit is not available elsewhere, and FSA must conclude that credit from other lenders is not likely to be available based on the farmer's circumstances.

A waiver of the credit denial requirement will only be granted after the FSA loan approval official has reviewed the farmer's financial statement, credit report, and other financial information and has determined that these clearly indicate that other credit would not be available.⁵⁹ The loan approval official must compare the credit standards of local agricultural lenders to the farmer's financial condition and must document how the farmer fails to meet those standards.

F. Borrower Training

The farmer must agree to meet FSA borrower training requirements.⁶⁰ A waiver of training requirements may be granted in some cases.⁶¹ If the farmer previously received FSA assistance that was conditioned on attending borrower training, the farmer will be ineligible for an EM loan until the earlier borrower training requirement is satisfied.⁶² Depending on how long it has been since the earlier assistance was received, the farmer must either be enrolled in and attending an approved borrower training course or have satisfactorily completed a course.

⁵⁵ Direct Loanmaking Handbook, page 10-10, para. 242.F (June 21, 2019).

⁵⁶ 7 C.F.R. § 764.352(e)(2) (2019); Direct Loanmaking Handbook, page 10-10, para. 242.F (June 21, 2019).

⁵⁷ Direct Loanmaking Handbook, page 10-10, para. 242.F (June 21, 2019).

⁵⁸ 7 C.F.R. § 764.352(e)(3) (2019); Direct Loanmaking Handbook, page 10-11, para. 242.F (June 21, 2019).

⁵⁹ Direct Loanmaking Handbook, page 10-11, para. 242.F (June 21, 2019).

⁶⁰ 7 C.F.R. § 764.101(j) (2019). The training requirements are set out in 7 C.F.R. §§ 764.452, 764.454 (2019).

⁶¹ 7 C.F.R. § 764.453 (2019); Direct Loanmaking Handbook, page 18-3, para. 472.B (June 21, 2019).

⁶² 7 C.F.R. § 764.454(a)(4) (2019).

G. Only Limited FSA Debt Forgiveness

A complicated set of rules restricts borrowing for farmers that have had a previous farm loan debt forgiven by FSA. These rules changed with the 2018 Farm Bill.

1. Debt Forgiveness and Loan Eligibility in General

In general, if a farmer received debt forgiveness on an FSA direct or guaranteed farm loan, that farmer cannot get a new farm loan.⁶³ If the farmer is an entity, this rule applies to all of the entity members.

There are several exceptions to this general rule.⁶⁴ The discussion here focuses on farmers who are seeking an EM loan. Other rules apply for other types of FSA farm loans.

2. EM Loan Exceptions to the General Rule

Congress has created an exception to the general debt forgiveness farm loan eligibility rule. It applies only to EM Loans.

If a farmer received FSA farm loan debt forgiveness only once, and that debt forgiveness was on or before April 4, 1996, the farmer can still be eligible for an EM loan.⁶⁵

If, however, the farmer received FSA farm loan debt forgiveness after April 4, 1996, the farmer is not eligible for an EM loan.⁶⁶ If the farmer is an entity, this rule applies to all of the entity members.⁶⁷

3. Defining Debt Forgiveness

There are a number of ways that FSA can forgive a farm debt. Some make a farmer not eligible for a future farm loan, and some do not have that effect. The general definition for debt forgiveness is explained below. Also explained is the way the definition changed with the 2018 Farm Bill for EM loans.

a. General Definition of Debt Forgiveness

According to FSA, debt forgiveness is a reduction or termination of a debt in a manner that results in a loss to FSA.⁶⁸

⁶³ 7 U.S.C. § 2008h(b); 7 C.F.R. §§ 761.2, “Debt forgiveness,” 764.101(d)(2), 764.352(f) (2019); Direct Loanmaking Handbook, page 10-12, para. 242.G (June 21, 2019).

⁶⁴ See for, example, 7 U.S.C. § 2008h(b)(2)(A).

⁶⁵ 7 U.S.C. § 2008h(b)(2)(B); 7 C.F.R. § 764.352(f) (2019); Direct Loanmaking Handbook, page 10-12, para. 242.G (June 21, 2019).

⁶⁶ 7 C.F.R. § 764.352(f) (2019); Direct Loanmaking Handbook, page 10-12, para. 242.G (June 21, 2019). However, if the farmer repays the forgiven debt, this rule does not apply and the farmer should be eligible for the EM program. See 7 C.F.R. § 761.2, “Debt forgiveness” (2019); Direct Loanmaking Handbook, page 10-12, para. 242.G (June 21, 2019).

⁶⁷ 7 C.F.R. § 764.352(f) (2019); Direct Loanmaking Handbook, page 10-12, para. 242.G (June 21, 2019).

⁶⁸ 7 C.F.R. § 761.2, “Debt forgiveness” (2019); Direct Loanmaking Handbook, Exhibit 2, page 7, “Debt forgiveness” (June 21, 2019).

b. *FSA Actions on the Farm Loan that Counts as Debt Forgiveness for EM Loan*

FSA can take several different kinds of action on a farm loan. The following actions count as debt forgiveness and can affect the farmer's eligibility for an EM loan.

(i) *Compromise, Adjustment, Charge-off*

FSA sometimes reduces a borrower's debt by compromise, adjustment, or reducing or charging off the debt.⁶⁹ This form a debt reduction, often called debt settlement, counts as debt forgiveness for EM loan eligibility.

(ii) *Loss on a Guaranteed Loan*

FSA makes what are known as guaranteed farm loans, when a lender makes the loan to the farmer and FSA guarantees the loan.⁷⁰ If the farmer causes a loss to the government on a guaranteed loan, it counts as debt forgiveness for EM loan eligibility.

(iii) *Bankruptcy*

If a farm loan debt is discharged as a result of the farmer's bankruptcy, this discharge counts as debt forgiveness for EM loan eligibility.⁷¹

c. *FSA Actions on the Farm Loan that DO NOT Count as Debt Forgiveness for EM Loans*

The following actions by FSA DO NOT count as debt forgiveness for EM loan eligibility.

(i) *Debt Restructuring and Write-Downs: 2018 Farm Bill Changes*

FSA can forgive farm loan debts through what it calls debt restructuring.⁷² These rules are intended to help keep the farm in business as some FSA debt is forgiven and results in debt write-downs.

In the past, this form of debt forgiveness counted as debt forgiveness and affected farm loan eligibility for all FSA farm loans.⁷³

⁶⁹ Direct Loanmaking Handbook, Exhibit 2, page 7, "Debt forgiveness(1)(ii)" (June 21, 2019). For definitions, see 7 C.F.R. 761.2, "Debt settlement," "Compromise," "Adjustment," "Debt Forgiveness (1)(ii)" (2019). For how these types of debt forgiveness work, see 7 U.S.C. § 1981; FSA Handbook, Direct Loan Servicing—Debt Collection and Resolution, 7-FLP, page 12-1 to 12-7, paras. 401.A-402.B (August 28, 2018).

⁷⁰ 7 U.S.C. § 1991(a)(12)(A)(iii); 7 C.F.R. 761.2, "Debt Forgiveness(1)(iii)" (2019); Direct Loanmaking Handbook, exhibit 2, page 7, "Debt forgiveness(1)(iii)" (June 21, 2019). For guaranteed loans, see 7 U.S.C. § 2005; 7 C.F.R. pt. 762 (2019); FSA Handbook, Guaranteed Loan Making and Servicing, 2-FLP (Rev. 1) (May 7, 2019).

⁷¹ 7 U.S.C. §1991(a)(12)(A)(iv).

⁷² See 7 U.S.C. § 2001; 7 C.F.R. § 761.2, "Debt writedown," "Restructuring" (2019); FSA Handbook, Direct Loan Servicing—Special and Inventory Property Management, 5-FLP (June 4, 2019).

⁷³ 7 U.S.C. §§ 2001; 1991(a)(12)(2017); 7 C.F.R. § 761.2, "Debt writedown" (2019).

The 2018 Farm Bill changed this rule as it applies to EM loans.⁷⁴ As of December 20, 2018, when the 2018 Farm Bill became law, debt restructuring that includes a write-down does not count as debt forgiveness for the purposes of EM loan eligibility.⁷⁵ In order to qualify for this exception to the debt forgiveness eligibility rule under the EM program, the farmer needed to have successfully made payments and kept agreements that were part of the restructuring.

For other FSA farm loans, debt restructuring that results in a write-down continues to count as debt forgiveness for loan eligibility.

(ii) Consolidation, Rescheduling, Reamortization, and Deferral

Farm loans can be consolidated, rescheduled, reamortized, or deferred under FSA rules.⁷⁶ Any of these actions by FSA do not count as debt forgiveness for future FSA loan eligibility—and therefore do not count as debt forgiveness for EM loan eligibility.⁷⁷

(iii) Discrimination Complaint

Farm loans can sometimes be written down as a result of a discrimination complaint made by the farmer against USDA.⁷⁸ If such a write-down happens, it does not count as debt forgiveness for future loan eligibility, and therefore does not count as debt forgiveness for EM loan eligibility.⁷⁹

(iv) Conservation Contract

FSA rules allow the agency to reduce a part of the farmer's debt in exchange for the farmer setting aside some of the land for conservation or wildlife purposes.⁸⁰ If this agreement is made, it does not count as debt forgiveness for future loan eligibility, and therefore does not count as debt forgiveness for EM loan eligibility.⁸¹

⁷⁴ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 5307(3) (2018) (codified at 7 U.S.C. § 2008h(b)(2)(B)(ii)).

⁷⁵ Direct Loanmaking Handbook, page 10-12, para. 242.G (June 21, 2019).

⁷⁶ 7 U.S.C. § 1991(a)(12)(B)(i); 7 C.F.R. § 761.2, "Consolidation," "Rescheduling," "Reamortization," "Deferral," "Debt forgiveness" (2019); Direct Loan Servicing—Special and Inventory Property Management Handbook, pages 4-1 to 4-70, paras. 131 to 161 (June 4, 2019).

⁷⁷ Direct Loanmaking Handbook, Exhibit 2, page 7, "Debt forgiveness" (June 21, 2019).

⁷⁸ For anti-discrimination rules, see FSA Handbook, General Program Administration, 1-FLP (Rev. 1), pages 3-1 to 3-6, para. 41 (March 18, 2019).

⁷⁹ 7 USC 1991(a)(12)(B)(ii); 7 C.F.R. § 761.2, "Debt forgiveness" (2)(ii) (2019); Direct Loanmaking Handbook, Exhibit 2, page 7, "Debt forgiveness" (2)(ii) (June 21, 2019).

⁸⁰ Direct Loan Servicing—Special and Inventory Property Management Handbook, pages 5-1 to 5-26, paras. 191 to 200 (June 4, 2019).

⁸¹ 7 C.F.R. § 761.2, "Debt forgiveness" (2)(i) (2019); Direct Loanmaking Handbook, Exhibit 2, page 7, "Debt forgiveness" (2)(i) (June 21, 2019).

(v) Repay FSA

If FSA forgives farmer debt and the farmer later repays FSA the amount that was forgiven, the loan forgiveness does not affect future loan liability, and therefore does not count as debt forgiveness for EM loan eligibility.⁸²

(vi) Some Youth Loans

FSA makes small youth loans. In some cases, FSA forgives the youth loan debt. If the forgiveness of the Youth Loan was due to circumstances beyond the borrower's control, the loan forgiveness does not affect future loan liability, and therefore does not count as debt forgiveness for EM loan eligibility.⁸³

H. No Outstanding Federal Judgment Liens

The farmer's property must not be subject to an outstanding federal judgment lien, though United States Tax Court liens are permitted.⁸⁴

I. No Recent Drug Convictions

The farmer and anyone else who will sign the loan agreement must not have been convicted under federal or state law of planting, cultivating, growing, producing, harvesting, or storing a controlled substance during the current crop year or the previous four crop years.⁸⁵ Additionally, applicants must not have been convicted of possessing or selling a controlled substance.⁸⁶

J. No Federal Crop Insurance Violations

Applicants who have willfully and intentionally provided false or inaccurate information to USDA or a crop insurance company with respect to a federal crop insurance policy or plan are not eligible to receive EM loan funds.⁸⁷

K. Agree to Repay Duplicative Federal Assistance

The farmer must agree that if other disaster assistance is received from a federal agency in addition to the EM loan—for the same losses—the duplicative benefits will be repaid to the

⁸² 7 C.F.R. § 761.2, "Debt forgiveness" (2)(iii) (2019); Direct Loanmaking Handbook, Exhibit 2, page 7, "Debt forgiveness" (2)(iii) (June 21, 2019).

⁸³ 7 C.F.R. § 761.2, "Debt forgiveness" (2)(v) (2019); Direct Loanmaking Handbook, Exhibit 2, page 7, "Debt forgiveness" (2)(v) (June 21, 2019).

⁸⁴ 7 C.F.R. § 764.101(g) (2019); Direct Loanmaking Handbook, page 4-11, para. 67.A (June 21, 2019).

⁸⁵ 7 C.F.R. §§ 764.101(a), 718.6(b) (2019); Direct Loanmaking Handbook, page 4-2, para. 62.A (June 21, 2019). A person convicted of a controlled substance violation is ineligible for benefits during the crop year of conviction as well as the four succeeding crop years. 7 C.F.R. § 718.6(b)(1) (2019). Controlled substances for this purpose are defined in 21 U.S.C. § 812. See 7 C.F.R. § 761.2, "Controlled substance" (2019).

⁸⁶ 7 C.F.R. § 718.6(b)(2) (2019); Direct Loanmaking Handbook, page 4-2, para. 62.B (June 21, 2019).

⁸⁷ 7 C.F.R. § 764.101(h) (2019); Direct Loanmaking Handbook, page 4-11, para. 68.A (June 21, 2019). The rule governing crop insurance violations is located at 7 C.F.R. § 718.11 (2019).

agency that provided them.⁸⁸ If at the time the EM loan is processed the farmer expects to receive additional disaster benefits, but the amount of those benefits is not known, the farmer must assign those benefits to FSA.⁸⁹

Benefits from programs enacted after an EM loan is approved will not affect the EM loan amount.⁹⁰ The use of the word “enacted” suggests that this exception applies only to benefits from those programs that are authorized by Congress after the EM loan approval.

L. Possess Legal Capacity

The farmer and anyone who will sign the loan agreement must possess the legal capacity to qualify for the loan.⁹¹ This means that the person must be of legal age and have the authority to enter into a legally binding agreement.⁹²

M. Meet Citizenship Requirements

The farmer and anyone who will sign the loan agreement must be a citizen of the United States, a non-citizen national, or a qualified alien under federal immigration laws.⁹³

VI. Qualifying Losses for EM Loans

To be eligible for an EM loan, a farmer must have suffered a qualifying loss.⁹⁴ There are two different types of qualifying losses: physical losses and production losses.⁹⁵ Farmers can qualify for an EM loan on the basis of either type of loss, or both.

A. Physical Losses

Farmers whose property, including livestock, was damaged by a disaster may qualify for an EM loan due to physical losses.⁹⁶ There is no minimum amount of physical loss required for EM eligibility.

1. Types of Property Eligible for Physical Loss Assistance

Physical loss is defined for EM loan purposes as verifiable damage to property or destruction of property, including both real estate and chattel property.⁹⁷ Chattel property is personal property, such as equipment and inventory. Damage to or

⁸⁸ 42 U.S.C. § 5155(b)(1); 7 C.F.R. § 764.352(k) (2019); Direct Loanmaking Handbook, page 10-14, para. 242.K (June 21, 2019).

⁸⁹ Direct Loanmaking Handbook, page 10-14, para. 242.K (June 21, 2019).

⁹⁰ Direct Loanmaking Handbook, page 10-14, para. 242.K (June 21, 2019). FSA may require that such benefits be assigned over to FSA to ensure repayment of the EM loan.

⁹¹ 7 C.F.R. § 764.101(b) (2019). The borrower must legally be able to sign a loan contract.

⁹² Direct Loanmaking Handbook, page 4-3, para. 63.A (June 21, 2019). If the borrower is an entity, this requirement applies to every member of the entity. The applicant must also possess the mental capacity to enter into a loan agreement. It is not clear what is meant by this requirement.

⁹³ 7 C.F.R. § 764.101(c) (2019); Direct Loanmaking Handbook, page 4-4, para. 64.A (June 21, 2019).

⁹⁴ 7 C.F.R. § 764.351 (2019); Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

⁹⁵ Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

⁹⁶ 7 C.F.R. §§ 764.351(a)(2) (2019), 761.2, “Chattel security,” “Physical loss” (2019).

⁹⁷ 7 C.F.R. § 761.2, “Physical loss” (2019); Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

destruction of annual growing crops is specifically excluded from eligibility as a physical loss for EM loan purposes, and must instead qualify as a production loss, discussed next.⁹⁸

Types of physical property that can count as the basis for a physical loss include the following.⁹⁹

a. *Property Essential to the Farm Operation*

Disaster-related damage to real estate or chattel that is essential to the farming operation is a qualifying physical loss for EM loan purposes.¹⁰⁰ Property is essential to the farming operation if it would be needed after the disaster for the farmer to be able to continue operating the farm as it was operated immediately prior to the disaster.¹⁰¹ Depending on the circumstances, essential property could include a dwelling, land and farm buildings, machinery, equipment, tools, or supplies needed for the farm. FSA will make the determination whether property is essential to the farmer's operation.¹⁰²

b. *Essential Household Items*

Disaster-related damage to the farmer's household items that must be repaired or replaced is a qualifying physical loss for EM loan purposes.¹⁰³ The items must be essential to maintain viable living quarters for the farmer's household.¹⁰⁴ Damage to luxury items, such as jewelry, furs, antiques, and paintings, is not a qualifying loss for EM loan purposes.¹⁰⁵

Damage to essential household items is an eligible physical loss only for individual borrowers. If the loan borrower is a business entity, the entity cannot receive an EM loan for damage to essential household items.¹⁰⁶

c. *Livestock*

All disaster-related livestock losses are treated as physical losses for EM loan purposes.¹⁰⁷

Even though all livestock losses are treated as physical losses, there are different rules for different types of livestock losses. For example, as discussed in the next

⁹⁸ 7 C.F.R. § 761.2, "Physical loss" (2019).

⁹⁹ 7 C.F.R. §§ 764.351(a), 764.352(i) (2019).

¹⁰⁰ 7 C.F.R. §§ 764.351(a), 764.352(i) (2019); Direct Loanmaking Handbook, page 10-1 through 10-3, para. 241.A-B (June 21, 2019).

¹⁰¹ 7 C.F.R. § 761.2, "Chattel or real estate essential to the operation" (2019); Direct Loanmaking Handbook, Exhibit 2, page 4, "Chattel or Real Estate Essential to the Farming Operation" (June 21, 2019).

¹⁰² 7 C.F.R. § 761.2, "Chattel or real estate essential to the operation" (2019).

¹⁰³ 7 C.F.R. §§ 764.351(a)(2)(iii), 764.352(i) (2019); Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

¹⁰⁴ 7 C.F.R. § 761.2, "Household contents" (2019); Direct Loanmaking Handbook, Exhibit 2, page 14, "Household contents" (June 21, 2019).

¹⁰⁵ 7 C.F.R. § 761.2, "Household contents" (2019).

¹⁰⁶ 7 C.F.R. § 764.353(d)(5) (2019).

¹⁰⁷ 7 C.F.R. §§ 764.351(a)(2), 761.2, "Chattel security," "Physical loss" (2019).

section of this Guide, EM loans for many types of livestock losses can be used to cover family living and farm operating expenses, but EM loans made for the loss of breeding stock cannot be used for these purposes.¹⁰⁸ Instead, loans for breeding stock losses can only be used to replace the lost breeding stock.

Farmers cannot qualify for EM loans based on losses of livestock raised under production contracts where the integrator retains ownership in the livestock and the farmer has no ownership interest.¹⁰⁹ Farmers who raise livestock under such contracts would be eligible for EM loans for losses to livestock, commodities, and chattel that they do own.

d. Harvested and Stored Crops

Disaster-related damage to harvested and stored crops—that would be sold or fed during the normal operating cycle—is a qualifying physical loss for EM loan purposes.¹¹⁰

e. Perennials that Produce an Agricultural Commodity

A qualifying physical loss includes the cost to restore damaged perennials, which produce an agricultural commodity, to the stage of development they had obtained prior to the disaster.¹¹¹

Physical losses to perennials can include losses to fruit, nut-bearing, or income-producing trees and plants, which result in their destruction or major damage.¹¹² FSA will not make EM loans available for such losses unless the fruit, nut-bearing, or income-producing trees and plants can be completely rehabilitated or reestablished within five years.¹¹³ The farmer must show the trees or plants will produce income for more than five years.

Farmers who wish to use EM loan funds to rehabilitate or reestablish fruit, nut-bearing, or income-producing trees and plants must meet additional eligibility requirements. Specifically, farmers must: (1) be the owner-operator of a citrus grove, orchard, or commercial woodlot; (2) provide FSA with a feasible plan for each year until the operation has been brought back to full production; and (3) verify that income from other farming enterprises or dependable off-farm income is sufficient to meet family living and farm operating expenses not related to the rehabilitation or reestablishment being financed with the EM loan funds.¹¹⁴

¹⁰⁸ 7 C.F.R. § 764.351(a)(2)(v) (2019); Direct Loanmaking Handbook, page 10-3, para. 241.B (June 21, 2019).

¹⁰⁹ Direct Loanmaking Handbook, page 10-9, para. 242.D (June 21, 2019).

¹¹⁰ 7 C.F.R. § 764.352(i) (2019); Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

¹¹¹ 7 C.F.R. §§ 764.351(a)(2)(iv), 764.352(i) (2019); Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

¹¹² Direct Loanmaking Handbook, Exhibit 21, page 2 (June 21, 2019).

¹¹³ Direct Loanmaking Handbook, Exhibit 21, page 1 (June 21, 2019).

¹¹⁴ Direct Loanmaking Handbook, Exhibit 21, page 2 (June 21, 2019).

2. Hazard Insurance Requirements for Physical Losses

Most physical property damaged in a disaster must have been covered by hazard insurance at the time of the disaster in order to qualify as a physical loss for EM loan purposes.¹¹⁵ In general, the level of insurance on the property must have been at least the tax value or cost-depreciated value of the property, whichever was less.¹¹⁶ If the tax value or cost-depreciated value of the property is very low, the level of coverage required will also be quite low.

For EM loan purposes, hazard insurance is defined as “insurance covering fire, windstorm, lightning, hail, explosion, riot, civil commotion, aircraft, vehicles, smoke, builders’ risk, public liability, property damage, flood or mudslide, workers compensation, or any similar insurance that is available and needed to protect the Agency security, or that is required by law.”¹¹⁷ The following rules apply.

a. Real Estate: Hazard Insurance Required

In general, real estate damaged by a disaster must have been covered by general hazard insurance at the time of the disaster in order to qualify for EM loan assistance.¹¹⁸ For real estate, the level of hazard insurance is not completely clear. The FSA Handbook states that the hazard insurance level for real estate must be the tax assessed value for the property.¹¹⁹ The federal regulations, however, suggest that the level of coverage is the lesser of the tax or cost depreciated value.¹²⁰

b. Chattel: Hazard Insurance Required if Available and Cost-Effective

Chattel property damaged by a disaster must have been covered by general hazard insurance at the time of the disaster if such insurance was readily available and its benefits justified its cost.¹²¹ The level of hazard insurance coverage required for chattel property is the established market value before the disaster.¹²²

c. Livestock: Hazard Insurance Not Required

The hazard insurance requirements do not apply to livestock.¹²³

¹¹⁵ 7 C.F.R. § 764.353(e)(1) (2019); Direct Loanmaking Handbook, page 10-15, para. 242.M (June 21, 2019).

¹¹⁶ 7 C.F.R. § 764.353(e)(1) (2019).

¹¹⁷ 7 C.F.R. § 761.2, “Hazard insurance” (2019).

¹¹⁸ 7 C.F.R. § 764.353(e)(1) (2019); Direct Loanmaking Handbook, page 10-15, para. 242.M (June 21, 2019).

¹¹⁹ Direct Loanmaking Handbook, page 10-15, para. 242.M (June 21, 2019).

¹²⁰ 7 C.F.R. § 764.353(e)(1) (2019).

¹²¹ 7 C.F.R. § 764.353(e)(1) (2019).

¹²² Direct Loanmaking Handbook, page 10-15, para. 242.M (June 21, 2019).

¹²³ Direct Loanmaking Handbook, page 10-15, para. 242.M (June 21, 2019). The current regulations seem to incorporate the policy that no hazard insurance is required for livestock because they categorize livestock separately from property covered by hazard insurance for purposes of physical loss calculations. 7 C.F.R. § 764.353(d) (2019). Thus, when the EM loan regulations are viewed as a whole, it seems FSA does intend to maintain the hazard insurance exemption for livestock.

d. Exception for Chicken Houses: Farmer Must Have Attempted to Obtain Hazard Insurance

FSA can make EM loans to poultry farmers to cover the cost of rebuilding lost chicken houses, even if the buildings were not covered by hazard insurance, provided the farmer meets four requirements.¹²⁴ First, the farmer must show that prior to the disaster, he or she applied for hazard insurance, but could not obtain it. Second, the farmer must use the EM loan funds to rebuild the chicken house according to industry standards in effect on the date the farmer applied for the loan. Third, the farmer must obtain hazard insurance for the full market value of the rebuilt chicken house for the term of the loan. And fourth, the farmer must meet all other EM loan requirements.¹²⁵

B. Production Losses

Disaster-related damage affecting agricultural production, other than livestock, is eligible for EM loan assistance as a production loss if the damage caused at least a 30 percent loss for at least one crop.¹²⁶ If this threshold requirement is met, all of the farmer's disaster-related crop losses—for those crops that are essential to the operation—will be totaled to determine the level of EM loan assistance available, even losses to crops that did not experience a 30 percent loss.¹²⁷

Eligible production losses include lower per-acre yields, reductions in crop quality, or losses to native pasture and rangeland.¹²⁸

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

To qualify as a production loss for EM loan purposes, the disaster must have reduced—by at least 30 percent—the production of any single crop that is a basic part of the farming operation.¹²⁹ A crop is considered a “basic part of the farming operation” if it normally generates enough income to be considered essential to the success of the operation.¹³⁰

To determine whether a farmer's production loss qualifies for EM loan assistance, the loss for each individual crop enterprise must be measured. Generally speaking, the disaster year production is compared to the farmer's normal production for each commodity.¹³¹ If the disaster year production is at least 30 percent less than normal

¹²⁴ 7 C.F.R. § 764.353(e)(2) (2019).

¹²⁵ 7 C.F.R. § 764.353(e)(2) (2019).

¹²⁶ 7 C.F.R. §§ 764.351(b), 764.352(h) (2019); Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

¹²⁷ Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

¹²⁸ Direct Loanmaking Handbook, pages 10-17 through 10-20, para. 244.B-F (June 21, 2019).

¹²⁹ 7 C.F.R. § 764.352(h) (2019); Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

¹³⁰ 7 C.F.R. § 761.2, “Basic part of an applicant's total farming operation” (2019). Although the regulatory definition provides that both crop and livestock enterprises could be considered “basic parts” of a farming operation, only crop enterprises can qualify as production losses for EM loans. 7 C.F.R. § 764.351(b) (2019).

¹³¹ 7 C.F.R. § 764.353(c) (2019); Direct Loanmaking Handbook, page 10-18, para. 244.C (June 21, 2019).

production for any single commodity, the farmer qualifies for an EM loan based on production losses.¹³² A more detailed discussion of calculating EM loan benefits for production losses is described later in this Guide.

2. Available for Losses to Agricultural Commodities Other Than Livestock and Commodities Grown Under Production Contracts

It appears that FSA intends for production loss loans to be available for all non-livestock commodities. The regulations are somewhat confusing regarding the types of agricultural commodities that qualify for production losses. The definition of “production loss” in the regulations only mentions annual growing crops.¹³³ Another section of the regulations says that EM loans may be used to address “production losses to agricultural commodities (except the losses associated with the loss of livestock).”¹³⁴ Agricultural commodity is defined in the to include grains, cotton, oilseeds, dry beans, tobacco, peanuts, sugar beets, sugar cane, fruit, vegetables, forage, tree farming, nursery crops, nuts, aquacultural species, and other plant or animal production as determined by FSA.¹³⁵

There is an exception to the general rule that all non-livestock commodities can qualify for production losses. The FSA Handbook emphasizes that losses of commodities grown under production contracts—where the integrator retains ownership in the commodity and the farmer has no ownership interest—are not eligible for EM loan assistance.¹³⁶ Farmers growing commodities under such contracts would be eligible for EM loans for losses to other commodities that they do own.

VII. Insurance Requirements for EM Loan Security

The EM loan regulations impose requirements for certain insurance coverage depending on the type of loan security.¹³⁷ In general, the farmer must obtain insurance at least equal to the EM loan principal amount or the value of the security at loan closing, whichever is less.

A. Crop Insurance

Farmers who receive EM loan funds will often be required to carry crop insurance.¹³⁸

1. Obtain Crop Insurance or Waive Emergency Crop Loss Assistance

All farmers who get an EM loan must either: (1) obtain crop insurance coverage, if it is available, for each crop that is a basic part of the farming operation for the year in which the loan is sought; or (2) waive future eligibility for emergency crop loss

¹³² 7 C.F.R. § 764.352(h) (2019).

¹³³ 7 C.F.R. § 761.2, “Production loss” (2019).

¹³⁴ 7 C.F.R. § 764.351(b) (2019).

¹³⁵ 7 C.F.R. § 761.2, “Agricultural commodity” (2019). “Aquaculture” is defined as “the husbandry of any aquatic organisms (including fish, mollusks, crustaceans or other invertebrates, amphibians, reptiles, or aquatic plants) raised in a controlled or selected environment of which the applicant has exclusive rights to use.” 7 C.F.R. § 761.2, “Aquaculture” (2019).

¹³⁶ Direct Loanmaking Handbook, page 10-9, para. 242.D (June 21, 2019).

¹³⁷ 7 C.F.R. § 764.108 (2019); Direct Loanmaking Handbook, page 6-1, para. 111.A (June 21, 2019).

¹³⁸ 7 C.F.R. § 764.108(c), (d) (2019); Direct Loanmaking Handbook, page 6-3, para. 112.C (June 21, 2019).

assistance in connection with any uninsured crops.¹³⁹ The crop insurance must be at least the catastrophic risk protection (CAT) level of coverage.

Regarding perennial crops, the farmer will be required to obtain crop insurance on all perennial crops for all subsequent crop years in which the loan is outstanding.¹⁴⁰ This rule only applies if perennial crops are used to secure a loan with a term of more than one year.

2. If Growing Crops are EM Loan Security—Crop Insurance Required If Available

Farmers are required to obtain crop insurance on any growing crop that is part of the “adequate security” for an EM loan.¹⁴¹ So long as crop insurance is available, the option of signing a waiver of eligibility for emergency crop loss assistance and retaining loan eligibility is not available for growing crops that are part of the adequate security for an EM loan.

3. If Crop Insurance Carried—Proceeds Must Be Assigned to FSA

EM loan borrowers must execute an assignment of their crop insurance indemnities to FSA.¹⁴²

B. Hazard Insurance

In addition to crop insurance, discussed above, the EM loan regulations require that security for an EM loan must be covered by hazard insurance if the insurance is readily available and the insurance premiums do not exceed the benefits to be obtained through the insurance.¹⁴³ Hazard insurance is defined for EM loan purposes as “insurance covering fire, windstorm, lightning, hail, explosion, riot, civil commotion, aircraft, vehicles, smoke, builders’ risk, public liability, property damage, flood or mudslide, workers compensation, or any similar insurance that is available and needed to protect the Agency.”¹⁴⁴ By Agency, FSA means FSA.

As discussed earlier in this Guide, FSA rules include authority for special hazard insurance requirements when EM loan funds will be used to replace chicken houses.¹⁴⁵ Under this authority, poultry farmers who obtain EM loans to rebuild chicken houses must obtain

¹³⁹ 7 C.F.R. § 764.108(d) (2019); Direct Loanmaking Handbook, page 6-3, para. 112.C (June 21, 2019). EM loans are not considered emergency crop loss assistance for this purpose. 7 C.F.R. § 762.123(a)(2)(ii) (2019).

¹⁴⁰ Direct Loanmaking Handbook, page 6-3, para. 112.C (June 21, 2019).

¹⁴¹ 7 C.F.R. § 764.108(c) (2019); Direct Loanmaking Handbook, page 6-3, para. 112.C (June 21, 2019).

¹⁴² 7 C.F.R. § 764.108(c), (d) (2019); Direct Loanmaking Handbook, page 6-3, para. 112.C (June 21, 2019).

¹⁴³ 7 C.F.R. § 764.108(a) (2019); Direct Loanmaking Handbook, page 6-1, para. 111.A (June 21, 2019). “Readily available” means that the insurance is sold by agents in the farmer’s normal trade area.

¹⁴⁴ 7 C.F.R. § 761.2, “Hazard insurance” (2019).

¹⁴⁵ 7 C.F.R. § 764.353(e)(2) (2019); Direct Loanmaking Handbook, page 10-15, para. 242.M (June 21, 2019).

hazard insurance on any new chicken house for its full market value for the term of the loan.¹⁴⁶

C. Flood or Mudslide Insurance

Federal law restricts the use of loan funds, including EM loan funds, on farms in flood or mudslide prone areas.¹⁴⁷ FSA regulations state that flood or mudslide insurance must be obtained for any real estate security located in flood or mudslide prone areas.¹⁴⁸

D. FSA Must Be Listed as Beneficiary of Insurance Policies

Depending on the type of EM loan security required, FSA must either be named as the loss payee for any insurance indemnity payment under a policy required by the EM loan regulations, or as a beneficiary of any mortgagee loss payable clause.¹⁴⁹

VIII. Calculating EM Loan Benefits

In general, EM loan benefits are limited to the value of the farmer's physical and production losses.¹⁵⁰ Therefore, establishing the value of those losses is a critical part of the EM loan application process. FSA regulations also set certain limitations on EM loan benefits that may reduce the amount of a farmer's loan.

A. Measuring Physical Losses

Farmers are eligible for EM loan assistance for their total eligible physical losses caused by the disaster.¹⁵¹ The maximum amount of EM loan assistance a farmer may receive for physical losses is determined by adding together the allowable costs for disaster-damaged property, costs for restoring perennials, costs for repairing or replacing household contents, and the total value of livestock losses.¹⁵² Eligible physical losses are calculated in the following way.

1. Calculate Allowable Costs to Replace or Repair Damaged Property

EM loan assistance for physical losses is based on "allowable costs" to replace or repair damaged property—both real estate and chattel—that is covered by hazard insurance.¹⁵³ Allowable costs are defined as replacement and repair costs that are supported by "acceptable" documentation.¹⁵⁴ Documentation that can be used to establish allowable costs includes, but is not limited to, written estimates, invoices, and bills.

¹⁴⁶ 7 C.F.R. § 764.353(e)(2)(iii) (2019); Direct Loanmaking Handbook, page 10-15, para. 242.M (June 21, 2019).

¹⁴⁷ 42 U.S.C. § 4012a. Through the National Flood Insurance Program, the Federal Emergency Management Agency (FEMA) designates special flood or mudslide prone areas and oversees the offering of flood insurance in communities where it is required. 44 C.F.R. pt. 59 (2019).

¹⁴⁸ 7 C.F.R. § 764.108(b) (2019); Direct Loanmaking Handbook, page 6-2, para. 112.B (June 21, 2019).

¹⁴⁹ 7 C.F.R. § 764.108 (2019).

¹⁵⁰ 7 C.F.R. § 764.353(b) (2019).

¹⁵¹ 7 C.F.R. § 764.353(b)(2) (2019).

¹⁵² 7 C.F.R. § 764.353(d) (2019).

¹⁵³ 7 C.F.R. § 764.353(d)(1) (2019); Direct Loanmaking Handbook, page 10-21, para. 244.G (May 10, 2019).

¹⁵⁴ 7 C.F.R. § 761.2, "Allowable costs" (2019).

As described immediately below, there are specific rules when calculating allowable costs for real estate, chattel, and essential household contents.

a. Cost of Replacing or Repairing Essential Damaged Real Estate

The allowable costs for replacing or repairing damaged farm real estate, including farm buildings, are included in the total physical loss amount.¹⁵⁵ As discussed earlier, to be included as an eligible loss, the damaged real estate must have been covered by hazard insurance at the time of the disaster.¹⁵⁶ The real estate must be essential to the farming operation in order to be eligible for EM assistance.¹⁵⁷

The amount needed for repair or replacement of some farm dwellings and service buildings must be supported by written estimates from the supplier or contractor who will provide the services.¹⁵⁸ EM loan funds may be used to pay for hired labor and purchased materials only. Labor, machinery, equipment, and materials contributed by the farmer cannot be included in the cost of repair or replacement.

b. Cost of Replacing or Repairing Essential Damaged Chattel

Eligible physical losses for EM loan purposes also include the amount of allowable costs needed to replace or repair damaged farm chattel that is essential to the farming operation.¹⁵⁹ As with real estate, damaged chattel must have been covered by hazard insurance at the time of the disaster to be included as an eligible physical loss, if such insurance was available and economically feasible.¹⁶⁰ The value of any labor, machinery, equipment, or materials contributed by the farmer to repair or replace his or her own damaged property will not be included as allowable costs.¹⁶¹

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

If the farmer is applying for EM loan assistance as an individual and not as a business entity, the allowable costs needed to repair or replace essential household contents will be included in the total physical loss.¹⁶² A farmer cannot receive more than \$20,000 in EM loan assistance for this purpose.

¹⁵⁵ 7 C.F.R. § 764.353(d)(2) (2019); Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

¹⁵⁶ 7 C.F.R. § 764.353(d)(2) (2019). The level of insurance on the property must have been at least the tax value or cost-depreciated value of the property, whichever was less. 7 C.F.R. § 764.353(e)(1) (2019); Direct Loanmaking Handbook, page 10-15, para. 242.M (June 21, 2019).

¹⁵⁷ 7 C.F.R. § 764.352(i) (2019); Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

¹⁵⁸ Direct Loanmaking Handbook, page 10-1, para. 241.A (June 21, 2019). This rule only applies if the buildings are outside of a flood or mudslide area.

¹⁵⁹ 7 C.F.R. §§ 764.352(i), 764.353(d)(1) (2019); Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

¹⁶⁰ 7 C.F.R. § 764.353(d)(1), (e)(1) (2019). The level of insurance on the property must have been at least the tax value or cost-depreciated value of the property, whichever was less. 7 C.F.R. § 764.353(e)(1) (2019); Direct Loanmaking Handbook, page 10-15, para. 242.M (June 21, 2019).

¹⁶¹ 7 C.F.R. § 764.353(d)(1) (2019).

¹⁶² 7 C.F.R. §§ 764.353(d)(5), 761.2, “Household contents” (2019); Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

2. Add Value of Livestock Losses

The replacement value of disaster-related livestock losses is included in the farmer's eligible physical losses for EM loan assistance.¹⁶³

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

The value of livestock and livestock product losses is established by written documentation of the livestock on hand before the loss, as well as records of sales that allow FSA to establish a value.¹⁶⁴

The value of livestock lost or destroyed as a result of the disaster will be the replacement cost less any salvage value received for the damaged livestock.¹⁶⁵ FSA will compare the disaster year production to the farmer's average production for the previous three years to determine the extent of disaster production losses.¹⁶⁶

The value of lost livestock products—such as calves, pigs, lambs, eggs, milk, and wool—will be established by FSA using prices published in FSA's state-specific price list for all commercially grown commodities.¹⁶⁷

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

Farmers who seek EM loan assistance for disaster losses to livestock must have written documentation of their livestock inventory and records of livestock product sales.¹⁶⁸ The documentation and records must be sufficient to allow FSA to value the livestock and livestock products just prior to the disaster.¹⁶⁹

¹⁶³ 7 C.F.R. § 764.353(d)(3) (2019); Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

¹⁶⁴ 7 C.F.R. § 764.353(d)(3) (2019).

¹⁶⁵ Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

¹⁶⁶ Direct Loanmaking Handbook, page 10-22, para. 244.H (June 21, 2019).

¹⁶⁷ Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

¹⁶⁸ 7 C.F.R. § 764.353(d)(3) (2019).

¹⁶⁹ 7 C.F.R. § 764.353(d)(3) (2019).

Livestock Loss**Example # 1**

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

The farmer's physical loss is calculated as follows:

$$50 \text{ cows} \times 0.90 \text{ (90 percent)} = 45 \text{ calves} \\ \text{(Number of cows} \times \text{normal calving rate} = \text{physical loss)}$$

$$45 \text{ calves} \times \$275 \text{ per calf} = \$12,375 \\ \text{(Physical loss} \times \text{normal price} = \text{lost income)}$$

$$50 \text{ cows} \times \$1,000 \text{ per cow} = \$50,000 \\ \text{(Number of cows} \times \text{replacement cost per cow} = \text{replacement cost)}$$

$$\$12,375 + \$50,000 = \$62,375 \\ \text{(Lost income} + \text{replacement cost} = \text{total physical loss)}$$

The farmer's total physical loss for the livestock is \$62,375.

Livestock Loss**Example # 2**

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

The farmer's physical loss is calculated as follows:

$$20 \text{ cows} \times 1,500 \text{ lbs. per cow per month} \times 3 \text{ months} = \\ 90,000 \text{ lbs. or } 900 \text{ cwt.} \\ \text{(Number of cows} \times \text{normal milk production per cow} \times \text{number of months before cows} \\ \text{could be replaced} = \text{physical loss)}$$

$$900 \text{ cwt.} \times \$12.25 \text{ per cwt.} = \$11,025 \\ \text{(Physical loss} \times \text{normal price} = \text{lost income)}$$

$$20 \text{ cows} \times \$1,200 \text{ per cow} = \$24,000 \\ \text{(Number of cows} \times \text{replacement cost per cow} = \text{replacement cost)}$$

$$\$11,025 + \$24,000 = \$35,025 \\ \text{(Lost income} + \text{replacement cost} = \text{total physical loss)}$$

The farmer's total physical loss for the livestock is \$35,025.

3. Add Costs of Restoring Perennials

Physical losses for EM loan purposes also include the allowable costs of restoring perennials—those that produce an agricultural commodity—to the stage of development the perennials were at before the disaster occurred.¹⁷⁰

4. Subtract Other Disaster Compensation, Insurance, and Salvage Value

When calculating a farmer's total eligible physical losses for EM loan assistance, FSA will subtract any other disaster-related compensation or insurance payments that the farmer has received or will receive for the damaged property.¹⁷¹ EM loan regulations seem to require subtracting other disaster-related compensation only when that compensation is specifically for the property that suffered the qualifying loss.

The FSA Handbook states that any salvage value received for damaged property will also be deducted from the qualifying physical loss amount.¹⁷²

B. Measuring Production Losses

Farmers can qualify for EM loans for the full amount of their eligible production losses.¹⁷³

1. Determine Normal Yield for Each Enterprise

The first step in calculating the farmer's production loss is to establish the farmer's normal yield for each crop.¹⁷⁴ When figuring the normal year's production, the farmer must use production record sources for each crop in the following order of priority.

a. Farmer's APH Yields

The preferred normal production yield for EM loan purposes will be the farmer's actual production history (APH) yield for the year in which the disaster occurred.¹⁷⁵ The farmer's APH yield is the yield used to determine federal crop insurance coverage or coverage under FSA's Noninsured Crop Disaster Assistance Program (NAP) and is an average of historical yields.¹⁷⁶

¹⁷⁰ 7 C.F.R. § 764.353(d)(4) (2019); Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

¹⁷¹ 7 C.F.R. § 764.353(d)(6) (2019); Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

¹⁷² Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

¹⁷³ 7 C.F.R. § 764.353(b)(3) (2019); Direct Loanmaking Handbook, page 10-16, para. 243.B (June 21, 2019).

¹⁷⁴ 7 C.F.R. § 764.353(c)(1) (2019).

¹⁷⁵ 7 C.F.R. § 761.2, "Normal production yield" (2019); Direct Loanmaking Handbook, page 10-17, para. 244.B (June 21, 2019).

¹⁷⁶ 7 C.F.R. § 761.2, "Normal production yield (1)" (2019). APH yield calculations for crop insurance purposes are set out in 7 C.F.R. part 400, subpart G (2019). APH yield calculations for NAP purposes are set out in 7 C.F.R. part 1437, subpart B (2019).

b. Farmer's Actual Reliable Farm Records

If the farmer does not have an approved APH yield for the crop for the disaster year, the normal production yield will be based on the average of the farmer's actual production records for the previous three years.¹⁷⁷

c. FSA Farm Program Proven Yields

If the farmer does not have adequate production records available for any or all of the previous three years, the normal production yield for any missing year will be based on the farmer's proven yields used to calculate farm program payments for that year.¹⁷⁸

d. County or State Average Yields

If proven yields for farm program payments are not available for any or all of the previous three years, the normal production yield for any missing year will be the county average production yield for the crop for that year.¹⁷⁹ These yields are listed by FSA.

If county average yields are not available, the normal production yield for any missing year will be the state average production yield for the crop.¹⁸⁰ These yields are listed by FSA.

2. Calculate Actual Losses for Each Crop

Actual losses for each crop are calculated for EM loan purposes in terms of lost crop value.¹⁸¹ Actual loss figures serve two important purposes. First, they are used to establish that the farmer experienced at least a 30 percent loss for at least one crop. As discussed earlier, this establishes that the farmer qualifies for an EM loan based on a production loss.¹⁸² Once the farmer has established production loss eligibility for at least one crop, all production losses from every essential enterprise are counted toward the total production loss.¹⁸³ Second, actual loss figures determine the total amount of production losses for all crops. This becomes part of the formula that determines the farmer's EM loan amount. These calculations take into account the fact that disasters can affect the quality as well as the quantity of crop production.

¹⁷⁷ 7 C.F.R. § 761.2, "Normal production yield (2)" (2019); Direct Loanmaking Handbook, page 10-17, para. 244.B (June 21, 2019).

¹⁷⁸ 7 C.F.R. § 761.2, "Normal production yield (2)" (2019); Direct Loanmaking Handbook, page 10-17, para. 244.B (June 21, 2019). These proven yields are the farmer's actual production yields and not the established yields set by the county committee.

¹⁷⁹ 7 C.F.R. § 761.2, "Normal production yield (3)" (2019); Direct Loanmaking Handbook, page 10-17, para. 244.B (June 21, 2019).

¹⁸⁰ Direct Loanmaking Handbook, page 10-17, para. 244.B (June 21, 2019).

¹⁸¹ 7 C.F.R. § 764.353(c) (2019); Direct Loanmaking Handbook, page 10-18, para. 244.C (June 21, 2019).

¹⁸² 7 C.F.R. § 764.352(h) (2019).

¹⁸³ Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

a. Production Losses Generally

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

(i) Subtract Disaster Yield from Normal Yield

The farmer's disaster year yield for the crop is first subtracted from the normal production yield.¹⁸⁴ This determines the farmer's per acre production loss.

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

The per acre yield loss is then multiplied by the number of acres in the operation devoted to that crop in the disaster year, in order to calculate the volume of lost production.¹⁸⁵

(iii) Multiply Lost Crop Volume by Market Price

The volume of lost production is then multiplied by the market price for the crop, as determined by FSA, to determine the value of the lost production. This is the farmer's actual loss amount for the crop.¹⁸⁶

b. Quality Loss Calculations

If the disaster reduced the quality of a farmer's production, FSA will account for this by adjusting the farmer's actual disaster yield downward.¹⁸⁷ In other words, quality losses are converted into quantity losses. This is done by comparing the average market price for a farmer's normal production grade with the average price for the grade of the disaster year production.¹⁸⁸

¹⁸⁴ 7 C.F.R. § 764.353(c)(1) (2019); Direct Loanmaking Handbook, page 10-18, para. 244.C (June 21, 2019).

¹⁸⁵ 7 C.F.R. § 764.353(c)(2) (2019); Direct Loanmaking Handbook, page 10-18, para. 244.C (June 21, 2019).

¹⁸⁶ 7 C.F.R. § 764.353(c)(3) (2019); Direct Loanmaking Handbook, page 10-18, para. 244.C (June 21, 2019). FSA will set unit prices for all commodities produced commercially in the state. Direct Loanmaking Handbook, page 10-18, para. 244.C (June 21, 2019). These prices are used to determine EM loan amounts for production losses for the next calendar year.

¹⁸⁷ Quality loss adjustments are described in the Handbook. See Direct Loanmaking Handbook, page 10-19, para. 244.D (June 21, 2019).

¹⁸⁸ Direct Loanmaking Handbook, page 10-19, para. 244.D, and page 10-20, para. 244.F (June 21, 2019).

Production Loss Example: Quality Loss Calculation¹⁸⁹

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

The farmer's quality adjustment is calculated as follows:

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

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

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

c. Native Pasture and Rangeland Loss Calculations

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

¹⁸⁹ Direct Loanmaking Handbook, page 10-20, Example 2, para. 244.F (June 21, 2019).

¹⁹⁰ Direct Loanmaking Handbook, page 10-19, para. 244.E (June 21, 2019).

Production Loss Example: Feed Loss Calculation ¹⁹¹

A farmer provides reliable records to show that the average cost for feed purchases in the previous three years was \$230 per head. The average feed cost in the disaster year was \$300 per head.

The farmer's production loss is calculated as follows:

$\$300 \text{ per head} \div \$230 \text{ per head} = 1.30$ (or 30 percent higher costs)
(Cost per unit in the disaster year divided by normal cost per unit equals the loss factor)

Because the disaster year cost is more than 30 percent greater than the normal cost, the feed loss qualifies for an EM loan. The production loss per head must therefore be calculated.

$\$300 \text{ per head} - \$230 \text{ per head} = \$70 \text{ per head}$
(Cost per unit in the disaster year minus normal cost per unit equals production loss per head)

This amount is multiplied by the number of head the farmer had during the disaster year to determine the farmer's total production loss. So, if the farmer had 100 head of cattle, the total production loss would be:

$\$70 \text{ per head} \times 100 \text{ head} = \$7,000 \text{ production loss}$

d. Substitute Crops

If a substitute crop is planted and harvested in place of a crop that was destroyed or could not be planted, the loss on the first crop will not be a qualifying production loss for EM loan purposes. ¹⁹² If, however, the substitute crop is damaged or destroyed by the disaster, that loss may qualify for EM loan assistance.

3. Total Up Production Losses for All Enterprises

The actual production loss amounts for all crops are totaled to determine the amount of EM loan assistance the farmer may be eligible to receive. ¹⁹³

¹⁹¹ Direct Loanmaking Handbook, page 10-19, para. 244.F (June 21, 2019).

¹⁹² Direct Loanmaking Handbook, page 10-13, para. 242.I (June 21, 2019).

¹⁹³ 7 C.F.R. § 764.353(b)(3) (2019).

4. Subtract Other Disaster Compensation or Insurance

The value of lost crop production is reduced by any other disaster-related compensation or insurance indemnities received or expected for the crop loss.¹⁹⁴ This then reduces the amount of EM loan assistance available for the farmer's production loss.

Examples of possible disaster-related compensation include: crop insurance payments, Noninsured Crop Disaster Assistance Program (NAP) payments, payments from other FSA disaster programs, and Federal Emergency Management Agency (FEMA) disaster assistance.¹⁹⁵ Only compensation received specifically for the production losses that are the basis of the EM loan will be deducted from the qualifying loan amount. Revenue insurance payments, for example, are not deducted from the amount of the EM loan because revenue insurance is not considered disaster-related assistance. Any compensation received for other losses will not be deducted.

Although other financial assistance received by the farmer for a disaster loss can affect the amount of EM loan funds the farmer can receive, the other financial assistance is not considered when determining whether the farmer has an EM-eligible production loss in the first place. In other words, FSA does not take into account other financial assistance when determining whether the farmer has suffered a qualifying production loss of at least thirty percent for at least one crop.

C. Maximum EM Loan Eligibility

There are several different considerations that can limit the EM loan amount that a farmer is eligible to receive. As discussed above, a farmer cannot borrow more than the actual value of his or her production losses and physical losses.¹⁹⁶ The following limits also apply.

1. Amount Necessary to Restore Farming Operation

An EM loan may not be larger than the amount of credit necessary to restore the family farming operation to its pre-disaster condition.¹⁹⁷

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

No individual or business entity may have more than \$500,000 in outstanding principal debt for all EM loans combined.¹⁹⁸ This limit applies to anyone who signs the promissory note for the loan.¹⁹⁹

3. Essential Household Items: \$20,000—Physical Losses Only

If an EM loan for physical losses includes losses to essential household items, no more than \$20,000 will be included in the loan amount for repairing or replacing those

¹⁹⁴ 7 C.F.R. § 764.353(c)(4) (2019); Direct Loanmaking Handbook, page 10-19, para. 244.C (June 21, 2019).

¹⁹⁵ Direct Loanmaking Handbook, page 10-19, para. 244.C (June 21, 2019).

¹⁹⁶ 7 C.F.R. § 764.353(b) (2019).

¹⁹⁷ 7 C.F.R. § 764.353(b)(1) (2019); Direct Loanmaking Handbook, page 10-16, para. 243.B (June 21, 2019).

¹⁹⁸ 7 C.F.R. §§ 761.8(a)(5), 764.102(b) (2019).

¹⁹⁹ 7 C.F.R. § 761.8(a) (2019).

items.²⁰⁰ As discussed earlier, losses to essential household items are eligible physical losses only for individual farmers and not for business entities.

IX. Permitted Uses of EM Loan Funds

FSA regulations restrict the use of EM loan funds. Permitted uses depend in part on the type of qualifying loss—whether a physical loss or production loss.²⁰¹

A. Uses of EM Loans for Physical Losses

Permitted uses of EM loans for physical losses are different depending on the type of property affected by the disaster.²⁰²

1. Physical Losses Affecting Essential Real Estate

EM loan funds may be used to address disaster-related damage to or destruction of essential real estate.²⁰³ As discussed earlier in the eligibility section, if the loan proceeds are going to be used for repair or replacement of real estate, the borrower must either be the owner of the farming operation or have a lease on the real estate meeting certain requirements.²⁰⁴ Permitted uses of loan funds for losses affecting real estate include the following.

a. Acquire or Enlarge the Farm

EM loan funds for damage to essential real estate may be used to acquire or enlarge the disaster-afflicted farm.²⁰⁵

Real estate may only be purchased with EM loan funds if the following conditions are met: (1) some or all of the farm's existing land was destroyed or rendered unusable for agricultural purposes; (2) the parcel being purchased is comparable in size and use to the damaged parcel; (3) the farmer owned the damaged parcel; (4) the salvage value of the damaged parcel, minus any liens, will be applied to the EM loan debt once the damaged parcel is sold; and (5) FSA will obtain a lien on all farm real estate that is determined to be unusable.²⁰⁶

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

EM loan funds for physical losses to real estate may be used to build, buy or improve buildings or other structures that are essential to the ongoing viability of

²⁰⁰ 7 C.F.R. § 764.353(d)(5) (2019); Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

²⁰¹ 7 C.F.R. § 764.351 (2019).

²⁰² 7 C.F.R. § 764.351(a) (2019); Direct Loanmaking Handbook, pages 10-1 through 10-4, para. 241.A-B (June 21, 2019).

²⁰³ 7 C.F.R. § 764.351(a)(1) (2019); Direct Loanmaking Handbook, page 10-1, para. 241.A (June 21, 2019).

²⁰⁴ 7 C.F.R. § 764.352(c)(1) (2019); Direct Loanmaking Handbook, page 10-9, para. 242.D (June 21, 2019).

²⁰⁵ 7 C.F.R. §§ 764.351(a)(1)(i), 764.151(a) (2019); Direct Loanmaking Handbook, page 7-1, para. 131.B and page 10-1, para. 241.A (June 21, 2019).

²⁰⁶ Direct Loanmaking Handbook, page 10-1, para. 241.A (June 21, 2019).

the farming operation.²⁰⁷ The buildings or structures must conform to industry standards and must meet the needs of the operation and the intended uses of the structures.²⁰⁸

Additional requirements apply if the farmer is leasing the property being built, bought, or improved with the EM loan funds. Specifically, the farmer's lease must ensure that the farmer will have use of the improvement over its useful life, or that the farmer will receive compensation for the remaining economic life of the improvement when the lease is terminated.²⁰⁹ The regulations do not describe how the economic life of improvements will be measured.

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

EM loan funds for physical losses to real estate may be used to pay for activities that promote soil and water conservation and protection on the farm.²¹⁰ EM loan funds may be used for these conservation, development, and resource replacement measures only if existing measures were damaged or destroyed during the disaster, or if the measures are needed as part of a conservation plan on purchased land.²¹¹ FSA Emergency Conservation Program (ECP) funding for these measures will be considered in conjunction with EM loan funds when available.

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

An EM loan for physical losses to real estate may be used to establish a new site for farm dwellings and service buildings in order to relocate outside of a flood or mudslide prone area.²¹²

e. *Replace Liquidated Land*

An EM loan for physical losses to real estate may be used to replace land from the farm that was sold or conveyed as a direct result of the disaster if the land is necessary for the farming operation to be effective.²¹³

²⁰⁷ 7 C.F.R. §§ 764.351(a)(1)(i), 764.151(b) (2019); Direct Loanmaking Handbook, page 7-2, para. 131.C and page 10-1, para. 241.A (June 21, 2019).

²⁰⁸ 7 C.F.R. §§ 764.102(e), 761.10 (2019).

²⁰⁹ 7 C.F.R. § 764.151(b) (2019); Direct Loanmaking Handbook, page 7-2, para. 131.C (June 21, 2019). If the leased property is on Indian tribal lands, trusts properties, or Hawaiian homelands, the farmer's leasehold must show an ownership interest. Direct Loanmaking Handbook, page 7-2, para. 131.C (June 21, 2019).

²¹⁰ 7 C.F.R. §§ 764.351(a)(1)(i), 764.151(c) (2019); Direct Loanmaking Handbook, page 7-3, para. 131.D and page 10-1, para. 241.A (June 21, 2019).

²¹¹ Direct Loanmaking Handbook, page 10-1, para. 241.A (June 21, 2019).

²¹² 7 C.F.R. § 764.351(a)(1)(ii) (2019); Direct Loanmaking Handbook, page 10-1, para. 241.A (June 21, 2019).

²¹³ 7 C.F.R. § 764.351(a)(1)(iii) (2019); Direct Loanmaking Handbook, page 10-1, para. 241.A (June 21, 2019).

f. Pay Closing Costs

EM loan funds for physical losses to real estate may be used to pay loan closing costs related to repairing or replacing real estate for the farm.²¹⁴

2. Physical Losses Affecting Essential Chattel Property

EM loan funds may also be used to remedy disaster-related damage to or destruction of chattel property that is essential to the farming operation.²¹⁵ Permitted uses of loan funds for such losses include the following.

a. Purchase Livestock, Equipment, and Other Necessary Chattel

EM loan funds for physical losses to chattel may be used to purchase essential chattel for the farming operation, including livestock, farm equipment, quotas and bases, and cooperative stock for credit, production, processing, or marketing purposes.²¹⁶

Loan funds for loss of harvested and stored crops that were intended for livestock feed rather than sale may only be used to replace those feed crops.²¹⁷

Only loan funds for physical losses to normal income security—such as livestock products and harvested and stored crops held for sale—may be used to purchase quotas and cooperative stock.²¹⁸

b. Repair or Replace Essential Household Contents

EM loan funds for physical losses to chattel may be used to repair or replace essential household contents that were damaged or destroyed by the disaster.²¹⁹ Household contents are the essential items necessary to maintain viable living quarters.²²⁰ Any EM loan funds used for this purpose cannot exceed \$20,000.²²¹

²¹⁴ 7 C.F.R. §§ 764.151(d) (2019).

²¹⁵ 7 C.F.R. § 764.351(a)(2) (2019); Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

²¹⁶ 7 C.F.R. § 764.351(a)(2)(i) (2019); Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

²¹⁷ Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

²¹⁸ Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

²¹⁹ 7 C.F.R. § 764.351(a)(2)(iii) (2019); Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

²²⁰ 7 C.F.R. § 761.2, “Household contents” (2019). Household contents do not include luxury items like furs, jewelry, antiques, and paintings. Direct Loanmaking Handbook, Exhibit 2, page 14, “Household contents” (June 21, 2019).

²²¹ 7 C.F.R. § 764.353(d)(5) (2019); Direct Loanmaking Handbook, page 10-21, para. 244.G (June 21, 2019).

c. *Restore Damaged Agricultural Perennials*

An EM loan for physical losses to chattel may be used to restore perennials that produce an agricultural commodity (such as fruit or nut trees) to the stage of development that the damaged perennials were at before the disaster.²²²

d. *Pay Reasonable Costs for Obtaining a Loan*

Farmers may use funds from an EM loan for physical losses to chattel to pay customary costs related to planning, obtaining, and closing a loan if the farmer cannot pay the costs from other sources.²²³ For example, FSA states that EM loan funds can be used to pay fees for legal, architectural, and other technical services. Fees for agricultural management consultation and preparation of FSA loan forms may not be paid for with EM loan funds.

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

Funds from an EM loan for physical losses to livestock that are not breeding stock may be used to pay essential farm operating and family living expenses.²²⁴ EM loan funds for physical losses to harvested crops that were stored for sale may also be used for this purpose.²²⁵

FSA defines the term “essential family living and farm operating expenses” as those that are “basic, crucial or indispensable.”²²⁶ FSA will determine if an expense

²²² 7 C.F.R. § 764.351(a)(2)(iv) (2019); Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

²²³ 7 C.F.R. § 764.351(a)(2)(ii) (2019); Direct Loanmaking Handbook, page 10-2, para. 241.B (June 21, 2019).

²²⁴ 7 C.F.R. § 764.351(a)(2)(v) (2019); Direct Loanmaking Handbook, page 10-3, para. 241.B (June 21, 2019). FSA has previously explained the distinction between the use of EM loan funds for breeding stock losses and those for market animal losses by stating that because breeding stock are an essential part of a farming operation, the funds for breeding stock losses can only be used to replace the breeding stock. Market animals, by contrast, are considered to generate normal production income, and therefore loan funds for their loss can be used to pay living and operating expenses. 67 Fed. Reg. 791, 793 (2002) (prefatory comments to final rule). FSA gives the following example for determining what amount of EM loan funds due to livestock losses would be available for farm operating and family living expenses: A producer suffers a loss of 100 brood cows and 90 of their calves. The calves would have been sold this year to produce farm income to pay expenses. The EM loan funds resulting from the loss of the calves may be used for family living and farm operating expenses, and other operating purposes, but the EM loan funds from the loss of the brood cows may only be used to purchase suitable replacements. Direct Loanmaking Handbook, page 10-3, para. 241.B (June 21, 2019).

²²⁵ 7 C.F.R. § 764.351(a)(2)(v) (2019); Direct Loanmaking Handbook, page 10-3, para. 241.B (June 21, 2019).

²²⁶ 7 C.F.R. § 761.2, “Essential family living and farm operating expenses” (2019). In its definition of essential family living and farm operating expenses, FSA gives examples of what are considered essential expenses. Examples of essential expenses include, but are not limited to, expenses needed for: household operating expenses; food; clothing; medical care; shelter; schooling; religious expenses; transportation; hired labor; machinery, farm building, and fence repair; interest on loans and credit or purchase agreements; rent on equipment, land, and buildings; feed; seed; fertilizer; pesticides and herbicides; spray materials and other farm supplies;

qualifies as an essential family living or farm operating expense after considering: (1) the specific borrower's operation; (2) what is typical for that type of operation in the area where the operation is located; and (3) what is an efficient method of production considering the borrower's resources.²²⁷

f. Refinance Debt

EM loan funds for physical losses to chattel may be used to refinance farm-related debt, both FSA debt and debts owed to other creditors.²²⁸ Existing FSA debt can only be refinanced with EM loan funds if the debt has not already been refinanced more than four times and the refinancing is necessary due to a designated or declared disaster.²²⁹

The following restrictions apply when refinancing debt with EM loan physical loss funds.²³⁰ First, only non-real estate debts incurred for farm purposes may be refinanced. Second, the EM loan funds must be for loss of normal income security, such as livestock products and crops that were harvested and stored for sale. Third, the farmer must be unable to develop a feasible plan without the refinancing. Fourth, the farmer must not have the resources—such as cash, stored crops, or bank accounts—to cure any delinquency on the debt. Fifth, the creditor to be refinanced, if not FSA, must be unwilling to restructure the debt at rates and terms that would permit the farmer to develop a feasible plan.²³¹ And sixth, the entire debt may not be refinanced if using the EM loan funds to pay only the farmer's delinquency or the current year's payment(s) on the debt would result in a feasible plan.

Although EM loan funds may not be used to refinance a real estate debt, EM loan funds may be used to pay past due or currently due payments on real estate debts.²³²

Several additional restrictions also apply when refinancing FSA direct and guaranteed loans with EM loan physical loss funds.²³³ First, only FSA farm loan program loans made for authorized operating loan purposes may be refinanced. Second, the farmer must be the sole person liable on the loan being refinanced. Third, for FSA direct loans, loan servicing or disaster set-aside must be insufficient

livestock expenses, including medical supplies, artificial insemination, and veterinarian bills; machinery hire; fuel and oil; taxes; water charges; insurance, including personal, property, and crop insurance; auto and truck expenses; and utility payments. Other types of expenses not listed as examples in the regulations may also be considered essential family and farm operating expenses.

²²⁷ 7 C.F.R. § 761.2, "Essential family living and farm operating expenses" (2019).

²²⁸ 7 C.F.R. § 764.351(a)(2)(vi) (2019); Direct Loanmaking Handbook, page 10-3, para. 241.B (June 21, 2019).

²²⁹ 7 C.F.R. § 764.351(a)(2)(vi)(A) (2019).

²³⁰ Direct Loanmaking Handbook, page 10-3, para. 241.B (June 21, 2019).

²³¹ Direct Loanmaking Handbook, page 10-4, para. 241.B (June 21, 2019). Restructuring includes, for this purpose, receiving an FSA guarantee of the debt if the creditor is eligible.

²³² Direct Loanmaking Handbook, page 10-3, para. 241.B (June 21, 2019).

²³³ Direct Loanmaking Handbook, page 10-4, para. 241.B (June 21, 2019).

to result in a feasible plan.²³⁴ And fourth, for FSA guaranteed loans, the need to refinance the guaranteed loan must be a result of the disaster, refinancing must be in the government's best interest, and the lender must be unwilling to refinance the guaranteed loan at rates and terms that would permit the farmer to develop a feasible plan.

Finally, FSA employees have no authority to guarantee that advances made to the farmer by other credit sources can be repaid out of EM loan funds.²³⁵

B. Uses of EM Loans for Production Losses

As discussed earlier, losses in annual production of agricultural commodities other than the loss of livestock can qualify for EM loans as production losses.²³⁶ Permitted uses of loan funds for production losses include the following.

1. Pay Annual Operating Expenses

EM loans for production losses may be used to pay annual operating expenses for the farm.²³⁷ The regulations give specific examples of eligible expenses—feed, seed, fertilizer, pesticides, farm supplies, and cash rent—but state that other operating expenses may also be eligible. Annual operating expenses also include the purchase of livestock used for normal operating income, including poultry and aquatic organisms.²³⁸

2. Pay Essential Family Living Expenses

EM loans for production losses may be used to pay the farmer's essential family living expenses.²³⁹ FSA gives examples of essential family living expenses—such as expenses for providing food, clothing, education, and shelter—but states that other types of expenses may also be considered as family living expenses.²⁴⁰

3. Pay Training Costs

Funds from an EM loan for production losses may be used to pay the costs of any training that is required or recommended by FSA.²⁴¹

²³⁴ This refers to loan servicing under 7 C.F.R. part 766, subpart C, and disaster set-aside under 7 C.F.R. part 766, subpart B (2019).

²³⁵ Direct Loanmaking Handbook, page 10-3, para. 241.B (June 21, 2019).

²³⁶ 7 C.F.R. § 764.351(b) (2019); Direct Loanmaking Handbook, page 10-5, para. 241.C (June 21, 2019).

²³⁷ 7 C.F.R. § 764.351(b)(2) (2019); Direct Loanmaking Handbook, page 10-5, para. 241.C (June 21, 2019).

²³⁸ Direct Loanmaking Handbook, page 10-5, para. 241.C (June 21, 2019).

²³⁹ 7 C.F.R. § 764.351(b)(5) (2019); Direct Loanmaking Handbook, page 10-6, para. 241.C (June 21, 2019).

²⁴⁰ 7 C.F.R. § 761.2, "Essential family living and farm operating expenses," "Family living expenses" (2019).

²⁴¹ 7 C.F.R. § 764.351(b)(4) (2019); Direct Loanmaking Handbook, page 10-5, para. 241.C (June 21, 2019).

4. Pay Costs to Reorganize Farm to Improve Profitability

Funds from an EM loan for production losses may be used to pay the costs of reorganizing the family farm to improve its profitability.²⁴² Bankruptcy expenses are not considered eligible costs for this purpose.

Reorganizing a farm means changing enterprises, production practices, marketing methods, or other parts of the farm business to promote recovery from the disaster and reduce the potential impact of future disasters.²⁴³ EM loan funds cannot be used to finance expansion of an existing farm enterprise, unless it is clearly shown that the expansion will promote recovery from the disaster and reduce the potential impact of future disasters.

FSA gives the following examples of acceptable uses of EM loan funds for this purpose: (1) purchasing equipment to convert from conventional to no-till production; (2) changing from stocker to cow/calf production; (3) shifting from row crop to vegetable production; (4) purchasing grain drying and storage equipment; and (5) purchasing shares in value-added processing and marketing cooperatives.²⁴⁴ These are only examples of acceptable purposes, and, according to FSA, “any similar operational changes are acceptable as long as a realistic farm operating plan . . . indicates the changes will improve the financial viability of the farm.”²⁴⁵

5. Replace Working Capital

EM loan funds for production losses may be used to replace lost working capital.²⁴⁶ Working capital is defined as the “cash available to conduct normal daily operations including, but not limited to, paying for feed, seed, fertilizer, pesticides, farm supplies, cooperative stock, and cash rent.”²⁴⁷

6. Refinance Debt

EM loans for production losses may be used to refinance farm-related debt for the purpose of improving farm profitability.²⁴⁸ FSA debt can only be refinanced with EM loan funds if the debt has not already been refinanced more than four times and the refinancing is necessary due to a designated or declared disaster.

Other restrictions apply when refinancing debt with EM loan production loss funds.²⁴⁹ First, only non-real estate debts incurred for farm purposes may be refinanced. Second, the farmer must be unable to develop a feasible plan without the refinancing. Third, the farmer must not have the resources—such as cash, stored crops, or bank accounts—to cure any delinquency on the debt. Fourth, the creditor to be refinanced

²⁴² 7 C.F.R. § 764.351(b)(1) (2019); Direct Loanmaking Handbook, page 10-5, para. 241.C (June 21, 2019).

²⁴³ Direct Loanmaking Handbook, page 10-5, para. 241.C (June 21, 2019).

²⁴⁴ Direct Loanmaking Handbook, page 10-5, para. 241.C (June 21, 2019).

²⁴⁵ Direct Loanmaking Handbook, page 10-5, para. 241.C (June 21, 2019).

²⁴⁶ 7 C.F.R. § 764.351(b)(7) (2019); Direct Loanmaking Handbook, page 10-7, para. 241.C (June 21, 2019).

²⁴⁷ 7 C.F.R. § 761.2, “Working capital” (2019).

²⁴⁸ 7 C.F.R. § 764.351(b)(6) (2019); Direct Loanmaking Handbook, page 10-6, para. 241.C (June 21, 2019).

²⁴⁹ Direct Loanmaking Handbook, page 10-6, para. 241.C (June 21, 2019).

must be unwilling to restructure the debt at rates and terms that would permit the farmer to develop a feasible plan.²⁵⁰ And fifth, the entire debt may not be refinanced if using the EM loan funds to pay only the farmer's delinquency and/or the current year's payment(s) on the debt would result in a feasible plan.

Although EM loan funds may not be used to refinance a real estate debt, EM loan funds may be used to pay past due or currently due payments on real estate debts as part of the farmer's operating expenses.²⁵¹

Additional restrictions also apply when refinancing FSA direct and guaranteed loans with EM loan production loss funds.²⁵² First, only FSA loans made for authorized operating loan purposes may be refinanced. Second, the farmer must be the sole person liable on the loan being refinanced. Third, for FSA direct loans, loan servicing or disaster set-aside must be insufficient to result in a feasible plan.²⁵³ And fourth, for FSA guaranteed loans, the need to refinance the guaranteed loan must be a result of the disaster, refinancing must be in the government's best interest, and the lender must be unwilling to refinance the guaranteed loan at rates and terms that would permit the farmer to develop a feasible plan.

Finally, FSA has no authority to guarantee that advances made to the farmer by other credit sources can be repaid out of EM loan funds.²⁵⁴ Farmers cannot rely on being able to use an EM loan to repay any specific debt or advance until the loan application has been processed and approved.

7. Pay Costs to Meet Safety Standards

EM loans for production losses may be used to pay the costs of complying with federal or state standards for occupational health and safety if the farmer can show that complying with the standards or facing penalties of non-compliance would cause substantial economic injury.²⁵⁵

C. Other Limits on the Use of EM Loans

The following restrictions also limit the use of EM loan funds, regardless of whether the farmer experiences a physical or production loss.

²⁵⁰ Restructuring includes, for this purpose, receiving an FSA guarantee of the debt if the creditor is eligible.

²⁵¹ Direct Loanmaking Handbook, page 10-6, para. 241.C (June 21, 2019).

²⁵² Direct Loanmaking Handbook, page 10-7, para. 241.C (June 21, 2019).

²⁵³ This refers to loan servicing under 7 C.F.R. part 766, subpart C, and disaster set-aside under 7 C.F.R. part 766, subpart B (2019).

²⁵⁴ Direct Loanmaking Handbook, page 10-7, para. 241.C (June 21, 2019).

²⁵⁵ 7 C.F.R. § 764.351(b)(3) (2019); Direct Loanmaking Handbook, page 10-5, para. 241.C (June 21, 2019).

1. Highly Erodible Land and Wetlands

EM loan funds may not be used for any purpose that contributes to excessive erosion of highly erodible land or to the conversion of wetlands.²⁵⁶ Additionally, EM loan funds may not be used to drain, dredge, fill, level, or otherwise alter a wetland.²⁵⁷

2. Activities that Impair Water Flow, Circulation, or Reach

EM loan funds may not be used for activities that would impair or impede the flow, circulation, or reach of water.²⁵⁸ Activities related to maintaining previously converted wetlands may be allowed.

3. Construction Standards

Any construction financed through EM loan funds must comply with applicable building standards established by federal, state, and local authorities.²⁵⁹ Construction financed through an EM loan must also meet FSA requirements for construction planning and monitoring.²⁶⁰

4. Support of a Non-Eligible Enterprise

EM loan funds cannot be used to support a non-eligible enterprise.²⁶¹ This remains true even if the non-eligible enterprise contributes to the farm. As described earlier in this Guide, non-eligible enterprises are those that produce exotic or non-farm animals or their products; market non-farm goods or provide non-farm services; or process or market products that were not produced by the farming operation.²⁶²

5. Credit Cards and Other Consumer Debt

EM loan funds may not be used to refinance consumer debt, such as automobile loans.²⁶³ Credit card debt may only be refinanced with EM loan funds if the debt can be attributed directly to the farming operation.

X. EM Loan Interest Rates, Terms, and Security Requirements

The federal regulations set out the following interest rates, repayment terms, and security requirements for EM loans.

²⁵⁶ 7 C.F.R. § 764.102(d)(1) (2019); Direct Loanmaking Handbook, page 4-20, para. 74.D (June 21, 2019).

²⁵⁷ 7 C.F.R. § 764.102(d)(2) (2019); Direct Loanmaking Handbook, page 4-20, para. 74.D (June 21, 2019).

²⁵⁸ 7 C.F.R. § 764.102(d)(3) (2019); Direct Loanmaking Handbook, page 4-20, para. 74.D (June 21, 2019).

²⁵⁹ 7 C.F.R. §§ 764.102(e), 761.10(d)(2), (3) (2019); Direct Loanmaking Handbook, page 4-20, para. 74.E (June 21, 2019).

²⁶⁰ 7 C.F.R. § 764.102(e) (2019). These requirements are set out at 7 C.F.R. § 761.10 (2019).

²⁶¹ 7 C.F.R. § 764.102(f) (2019); Direct Loanmaking Handbook, page 4-20, para. 74.F (June 21, 2019).

²⁶² 7 C.F.R. § 761.2 “Non-eligible enterprise” (2019).

²⁶³ 7 C.F.R. § 764.353(f) (2019); Direct Loanmaking Handbook, page 10-16, para. 243.C (June 21, 2019).

A. Interest Rates

As of August 1, 2019, the annual interest rate for EM loans was 3.75 percent.²⁶⁴ This rate is subject to change.

B. Repayment Terms

The EM loan regulations set out maximum repayment periods and minimum payment requirements.²⁶⁵

1. Repayment Periods

Repayment periods for EM loans depend upon the type of loss, the farmer's repayment ability, and the useful life of the farmer's loan security.²⁶⁶

a. EM Loans for Physical Losses to Real Estate

The repayment period for EM loan funds for losses to real estate will be based on FSA's assessment of the farmer's repayment ability and the useful life of the security.²⁶⁷ The repayment period for such EM loans can never be longer than forty years. The repayment period for such loans will be the minimum period of time allowed by the farmer's ability to repay the loan, considered in five-year increments.²⁶⁸

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

For production losses and physical losses to chattel, including livestock, the EM loan repayment period can generally be no longer than seven years.²⁶⁹ Exceptions to this loan repayment period can be made by FSA if it is necessary to improve the farmer's repayment ability and the farmer is able to also pledge real estate security.²⁷⁰ In such cases, the repayment period for these loans could be extended up to a maximum of twenty years from the date of the loan.

²⁶⁴ For interest rates, see <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/index>. If the loan rate does change, the farmer is entitled to have the rate which is in effect upon loan approval or loan closing, whichever is lower. 7 C.F.R. § 764.354(a)(2) (2019); Direct Loanmaking Handbook, page 10-23, para. 245.A (June 21, 2019).

²⁶⁵ 7 C.F.R. § 764.354(b) (2019).

²⁶⁶ 7 C.F.R. § 764.354(b)(1) (2019); Direct Loanmaking Handbook, page 10-23, para. 245.B (June 21, 2019). The Handbook emphasizes that the farmer's ability to repay the loan is a "critical factor" in determining the repayment term for the loan.

²⁶⁷ 7 C.F.R. § 764.354(b)(5) (2019); Direct Loanmaking Handbook, page 10-25, para. 245.F (June 21, 2019).

²⁶⁸ Direct Loanmaking Handbook, page 10-25, para. 245.F (June 21, 2019). For example, if a 15-year loan term would not result in a feasible plan, then 20 years would be considered, and so on until the projected installments result in a feasible plan.

²⁶⁹ 7 C.F.R. § 764.354(b)(4) (2019); Direct Loanmaking Handbook, page 10-24, para. 245.E (June 21, 2019). This category includes, but is not limited to, property with an expected life of one to seven years.

²⁷⁰ 7 C.F.R. § 764.354(b)(4) (2019); Direct Loanmaking Handbook, page 10-24, para. 245.E (June 21, 2019).

If payment within seven years is not feasible, a ten-year term will be considered, and then consecutively longer intervals in two-year increments until a feasible plan is developed or the term is extended to twenty years.²⁷¹

c. EM Loans for Operating Expenses

If a farmer receives an EM loan to pay annual operating expenses, that loan must generally be repaid within twelve months.²⁷² The repayment period may be extended an additional six months (for a total of eighteen months) if necessary to accommodate the farmer's production cycle. Payment on annual operating loans must be scheduled for the time when the farm plan shows that income will be available to make the payment.²⁷³

This repayment period does not apply to expenses associated with reestablishing perennials.²⁷⁴ These expenses presumably fall under the seven-year repayment limit for physical losses to chattel discussed above.

2. At Least One Payment Per Year

Repayment of EM loans must be scheduled so that there is at least one payment every year.²⁷⁵ The minimum annual payment must be at least the amount of interest accrued on the principal loan balance at the time the payment is scheduled to be made.²⁷⁶

If unequal or interest-only installments are scheduled, the farmer must be able to show that he or she will have the resources available to pay the loan in full by the final maturity date.²⁷⁷

3. Balloon Payments Prohibited

Balloon installments are prohibited in EM loan repayment schedules.²⁷⁸ A balloon installment occurs when scheduled payments are so low that the final installment is greater than twice the amount of a regularly amortized installment.

C. Repayment Ability

Before an EM loan application will be approved, the farmer must submit a feasible plan that demonstrates his or her ability to repay the loan and satisfy all the farmer's other credit needs and obligations.²⁷⁹

²⁷¹ Direct Loanmaking Handbook, page 10-24, para. 245.E (June 21, 2019).

²⁷² 7 C.F.R. § 764.354(b)(3) (2019); Direct Loanmaking Handbook, page 10-23, para. 245.D (June 21, 2019).

²⁷³ Direct Loanmaking Handbook, page 10-23, para. 245.D (June 21, 2019).

²⁷⁴ 7 C.F.R. § 764.354(b)(3) (2019); Direct Loanmaking Handbook, page 10-23, para. 245.D (June 21, 2019).

²⁷⁵ 7 C.F.R. § 764.354(b)(2) (2019); Direct Loanmaking Handbook, page 10-23, para. 245.C (June 21, 2019).

²⁷⁶ Direct Loanmaking Handbook, page 10-23, para. 245.C (June 21, 2019).

²⁷⁷ Direct Loanmaking Handbook, page 10-23, para. 245.C (June 21, 2019).

²⁷⁸ Direct Loanmaking Handbook, pages 10-24 and 10-25, para. 245.E-F (June 21, 2019).

²⁷⁹ 7 C.F.R. § 764.401(a)(1) (2019); Direct Loanmaking Handbook, page 15-5, para. 352.C (June 21, 2019).

A “feasible plan” is defined as a cash flow budget or a farm operating plan that shows the farmer has sufficient “cash inflow” to pay all “cash outflow.”²⁸⁰ Cash inflow includes anticipated farm income, nonfarm income, all loan advances, cash on hand, and may also include other sources of anticipated cash inflow.²⁸¹ Cash outflow includes all farm and nonfarm debt that will be incurred during the period covered by the budget. If the loan request is for only one production cycle, a feasible plan is only required for one production cycle. If the loan request is for more than one production cycle, the plan must reflect a typical cycle.²⁸²

If the farmer’s plan is dependent on the availability of additional credit, the farmer must provide written documentation showing that the additional credit has been approved.²⁸³

D. Security for EM Loans

Each EM loan must be secured by the farmer’s assets.²⁸⁴

1. Minimum Security Requirements

The EM loan regulations set out minimum security requirements for EM loans.²⁸⁵ An EM loan will not be approved unless the farmer can satisfy these minimum requirements.

a. “Adequate Security”—Collateral Value Equals Loan Amount

Generally, FSA requires that the farmer secure loans with assets having a security value that is at least equal to the EM loan amount.²⁸⁶ FSA refers to this as “adequate security.” In determining whether a farmer has provided adequate security, FSA will only count the value of the farmer’s equity interest in the property being pledged.²⁸⁷

An exception to this general rule, for when adequate security is not available, is described in more detail below.

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

FSA will generally expect the farmer to provide a security interest in any property that is purchased, refinanced, produced, or otherwise affected by the farmer’s use of the EM loan funds. If an EM loan is made for real estate losses, the loan must be

²⁸⁰ 7 C.F.R. § 761.2(b), “Feasible plan” (2019); Direct Loanmaking Handbook, Exhibit 2, “Feasible plan” (June 21, 2019).

²⁸¹ 7 C.F.R. § 761.2(b), “Cash flow budget,” “Feasible plan” (2019); Direct Loanmaking Handbook, Exhibit 2, page 4, “Cash flow budget,” page 12, “Feasible plan” (June 21, 2019).

²⁸² 7 C.F.R. § 761.2, “Feasible plan” (2019); Direct Loanmaking Handbook, Exhibit 2, “Feasible plan” (June 21, 2019).

²⁸³ Direct Loanmaking Handbook, Exhibit 2, page 12, “Feasible plan” (June 21, 2019).

²⁸⁴ 7 C.F.R. § 764.355(a), (b) (2019); Direct Loanmaking Handbook, page 10-26, para. 246.A (June 21, 2019).

²⁸⁵ 7 C.F.R. §§ 764.355(a), (b), 764.103(b) (2019); Direct Loanmaking Handbook, page 10-26, para. 246.A (June 21, 2019).

²⁸⁶ 7 C.F.R. §§ 764.103(b), 761.2, “Adequate security” (2019); Direct Loanmaking Handbook, page 5-1, para. 91.B (June 21, 2019).

²⁸⁷ 7 C.F.R. § 761.2, “Security value” (2019).

secured, at a minimum, by the real estate that is being purchased or improved with the loan funds.²⁸⁸ If an EM loan is made for chattel or production losses, the loan must be secured, at a minimum, by the chattel that is being purchased or produced with the loan funds.²⁸⁹

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

If the value of the real estate and chattel security that is required for an EM loan is not enough to provide adequate security for the loan, FSA will take a security interest in other property.²⁹⁰ When there are several alternatives available that meet FSA's security requirements, FSA will choose which property it wants to take a security interest in.²⁹¹ The following are the various types of property in which FSA can take a security interest in order to adequately secure a farmer's loan.

(i) Non-Ownership Interests in Property

A farmer's interest in property that is not owned by the farmer can be given as security for an EM loan and will be considered when determining whether the farmer has pledged adequate security.²⁹² Examples given in the regulations of possible non-ownership interests include leases that provide a mortgageable value, water rights, easements, mineral rights, and royalties.

(ii) Third-Party Pledge of Security

If needed to provide adequate security for an EM loan, FSA will take a pledge of security from someone other than the farmer or farm entity seeking the loan.²⁹³

(iii) Residence Located Apart from Real Estate Collateral

If it is necessary to provide adequate or additional security for an EM loan, FSA will take a security interest in a farmer's residence and related real estate that is located on a separate parcel of land from the farm.²⁹⁴

²⁸⁸ 7 C.F.R. §§ 764.355(a), 764.155(b) (2019).

²⁸⁹ 7 C.F.R. §§ 764.355(b), 764.255(b)(1) (2019).

²⁹⁰ 7 C.F.R. § 764.103(b) (2019); Direct Loanmaking Handbook, page 5-1, para. 91.B (June 21, 2019).

²⁹¹ 7 C.F.R. § 764.103(d) (2019); Direct Loanmaking Handbook, page 5-2.5, para. 91.D (June 21, 2019).

²⁹² 7 C.F.R. § 764.103(b)(2) (2019); Direct Loanmaking Handbook, page 5-1, para. 91.B (June 21, 2019).

²⁹³ 7 C.F.R. § 764.103(b)(1) (2019); Direct Loanmaking Handbook, page 5-1, para. 91.B (June 21, 2019).

²⁹⁴ 7 C.F.R. § 764.106(d) (2019); Direct Loanmaking Handbook, page 5-12, para. 94.E (June 21, 2019). FSA will not take a security interest in separate residential property unless, after taking prior liens into consideration, the equity value of other security property—real estate, crops, and chattel—is less than 150 percent of the unpaid loan balance.

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

FSA is prohibited by statute from rejecting an EM loan application because of inadequate security if FSA is “reasonably certain” that the farmer can repay the loan.²⁹⁵ An EM loan application may be approved—even if the value of all available collateral does not equal the loan amount—if several conditions are met.

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

In order to use repayment ability in place of adequate security for an EM loan, the farmer must pledge all available personal and business property as collateral for the loan.²⁹⁶ All personal and business assets must be pledged both by an individual farmer who seeks to use repayment ability as collateral for an EM loan, and by all of the members, stockholders, partners, and joint operators of a farm business entity that seeks to do so.²⁹⁷

(ii) Lack of Security Caused by Disaster

To be able to rely on repayment ability in place of adequate security for an EM loan, the farmer’s lack of adequate security must be due to the disaster.²⁹⁸

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

FSA must believe that the farmer’s approved plan, discussed above, provides “reasonable assurance” that the farmer will be able to repay the loan and all other obligations.²⁹⁹ This repayment ability must be based on the farmer’s ongoing operation, and must reflect the farmer’s production and income history.³⁰⁰

²⁹⁵ 7 U.S.C. § 1964(d)(2)(A).

²⁹⁶ 7 C.F.R. § 764.355(c)(1) (2019); Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019). Property for which no valid lien is available is excluded from this requirement. See 7 C.F.R. § 764.106(c) (2019). In addition, this requirement does not apply to property that falls within any of the following categories: subsistence livestock, cash, working capital accounts the applicant uses for the farming operation, retirement accounts, personal vehicles necessary for family living, household contents, or small equipment such as hand tools and lawn mowers. 7 C.F.R. § 764.106(e) (2019).

²⁹⁷ Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019).

²⁹⁸ 7 C.F.R. § 764.355(c) (2019); Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019).

²⁹⁹ 7 C.F.R. § 764.355(c) (2019); Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019).

³⁰⁰ 7 C.F.R. §§ 764.355(c)(2), 761.2 “Feasible plan” (2019); Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019).

(iv) Farmer's Plan Addresses Pricing Risks

The farmer's approved plan must also address pricing risks applicable to the operation.³⁰¹ The regulations state that acceptable ways to address pricing risks include marketing contracts, hedging, options, revenue protection mechanisms, and a marketing plan or "similar risk management practices."

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

To be able to use repayment ability in place of adequate security for an EM loan, the farmer must have had a positive net cash farm income in at least three of the previous five years.³⁰² The farmer's annual cash flow will be determined from the farmer's tax records for the five years immediately preceding the disaster year.³⁰³

If the farmer has been in operation for fewer than five years, there must have been a positive net farm cash income in at least half of the years of operation.³⁰⁴

(vi) USDA Program Payments Assigned to FSA

Farmers who use repayment ability as collateral for an EM loan must give FSA an assignment of any payments to be received under USDA programs, including FSA farm programs.³⁰⁵

2. Other Security Requirements

Once a farmer is able to pledge enough collateral to meet the minimum "adequate security" requirements, FSA will seek additional collateral that can further secure the EM loan, when it is available.³⁰⁶

a. "Additional Security"—Collateral Value Equals 150 Percent of Loan Amount

FSA will require security valued at up to 150 percent of the amount of the loan if it is available.³⁰⁷ This is referred to as "additional security."³⁰⁸ An EM loan will not be denied if the farmer is unable to provide this additional security. FSA will not take additional security in cases where adequate security—equal to 100 percent of the loan amount—is available and further liens would prevent the farmer from

³⁰¹ 7 C.F.R. § 764.355(c)(2) (2019); Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019).

³⁰² 7 C.F.R. § 764.355(c)(3) (2019); Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019).

³⁰³ Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019). Net farm income will be determined by subtracting all cash farm expenses from all farm income reported on the farmer's federal income tax return. Depreciation shown on Schedule F of a federal income tax return will not be included as an expense.

³⁰⁴ Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019).

³⁰⁵ 7 C.F.R. § 764.355(c)(4) (2019); Direct Loanmaking Handbook, page 10-27, para. 246.B (June 21, 2019).

³⁰⁶ 7 C.F.R. § 764.103(c) (2019); Direct Loanmaking Handbook, page 5-2, para. 91.C (June 21, 2019).

³⁰⁷ 7 C.F.R. § 764.103(c) (2019); Direct Loanmaking Handbook, page 5-2, para. 91.C (June 21, 2019).

³⁰⁸ 7 C.F.R. §§ 761.2, "Additional security," 764.103(c) (2019).

obtaining credit from other sources.³⁰⁹ If, however, additional collateral is available and the farmer refuses to pledge it, FSA may deny or cancel the EM loan.³¹⁰ FSA will generally want to have collateral up to the full “additional security” amount. The following rules apply.

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

The personal assets of individual owners of a farm business entity will be taken as security for an EM loan made to the entity when the value of the entity's assets is not enough to satisfy the additional security requirement.³¹¹

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

The EM loan regulations set out certain categories of property that FSA will not require the farmer to offer as collateral to satisfy the additional security requirement.³¹²

(a) Real Estate with Liability or Environmental Concerns

FSA will not take a security interest in real estate that could have significant environmental problems or costs.³¹³

(b) Valid Lien Not Available

FSA will not take a security interest in property if it is not possible to obtain a valid lien.³¹⁴

(c) Residence Located Apart From Real Estate Collateral

As mentioned above, if other available security provides 150 percent or more of the loan balance, FSA will not require the farmer to pledge his or her residence and related real estate as security if it is located on a separate parcel of land from the farm.³¹⁵

(d) Assets Used for Farming or Essential Living Expenses

If the adequate security requirement has been satisfied, FSA will not require the farmer to pledge subsistence livestock, cash, working capital accounts used for the farming operation, retirement accounts, personal

³⁰⁹ 7 C.F.R. § 764.106(a) (2019).

³¹⁰ 7 U.S.C. § 1964(d)(2)(B).

³¹¹ Direct Loanmaking Handbook, page 5-2, para. 91.C (June 21, 2019).

³¹² 7 C.F.R. § 764.106 (2019).

³¹³ 7 C.F.R. § 764.106(b); 7 C.F.R. pt. 799 (2019); Direct Loanmaking Handbook, page 5-11, para. 94.C (June 21, 2019).

³¹⁴ 7 C.F.R. § 764.106(c) (2019); Direct Loanmaking Handbook, page 5-12, para. 94.D (June 21, 2019).

³¹⁵ 7 C.F.R. § 764.106(d) (2019); Direct Loanmaking Handbook, page 5-12, para. 94.E (June 21, 2019).

vehicles necessary for family living, household contents, and small tools and equipment such as hand tools and lawn mowers.³¹⁶

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

If the farmer has non-essential assets that cannot be converted to cash (to decrease the farmer's credit needs), and those assets have an individual or total value of more than \$5,000, FSA will take a security interest in the assets.³¹⁷ This is true even if the adequate security and additional security requirements have been met.³¹⁸ The nonessential assets must be pledged in addition to any other security requirements, and they will not be counted when determining whether the farmer has provided security up to 150 percent of the loan amount. The value of any non-essential assets may be included in the adequate security value calculation if it is necessary for the farmer to meet the 100 percent collateral requirement.

Non-essential assets are defined as assets: (1) in which the farmer has an ownership interest; (2) that do not contribute income to pay essential family living expenses or to maintain the farming operation; and (3) that are not exempt from creditor judgment or bankruptcy actions.³¹⁹ Examples of non-essential assets might include recreational vehicles or vacation property.

The requirement to pledge all non-essential assets with a total value of more than \$5,000 also applies to all of the individual members of a farm business entity that is seeking an EM loan.³²⁰

3. Indian Trust Land as EM Real Estate Loan Security

FSA may take a lien on Indian trust lands as security for an EM loan if the applicant requests the Bureau of Indian Affairs (BIA) to furnish title status reports and the BIA provides those reports and approves the lien.³²¹

4. FSA's Required Lien Positions

The EM loan regulations set out required lien positions that must be available to FSA in security property.³²²

³¹⁶ 7 C.F.R. § 764.106(e) (2019); Direct Loanmaking Handbook, page 5-12, para. 94.F (June 21, 2019).

³¹⁷ 7 C.F.R. § 764.103(e) (2019). If the total value of all the farmer's nonessential assets is \$5,000 or less, FSA will not require a lien.

³¹⁸ 7 C.F.R. § 764.103(e) (2019); Direct Loanmaking Handbook, page 5-2.5, para. 91.E (June 21, 2019).

³¹⁹ 7 C.F.R. § 761.2, "Non-essential asset" (2019).

³²⁰ Direct Loanmaking Handbook, page 5-2.5, para. 91.E (June 21, 2019).

³²¹ 7 C.F.R. § 764.104(c) (2019); Direct Loanmaking Handbook, page 5-8, para. 92.E (June 21, 2019).

³²² 7 C.F.R. § 764.104 (2019).

a. Required Lien Position for Real Estate Security

If the farmer gives real estate as security for an EM loan and a first lien is available, FSA must take the first lien on the property.³²³ If the first lien is not available, FSA can take a junior lien on the real estate security when the following conditions are met: (1) the prior lien(s) will not jeopardize FSA's interest or the farmer's ability to repay the EM loan; (2) all prior lienholders agree to notify FSA before a foreclosure; (3) the farmer agrees to get written permission from FSA before increasing an existing lien; and (4) the farmer has equity in the property.

b. Requirements for Real Estate Security Under a Purchase Contract

If the farmer is pledging real estate that is held under a recorded purchase contract, the following conditions must be met for the property to be accepted as security: (1) the farmer must provide a security interest in the real estate; (2) the farmer and the seller must agree in writing that any insurance proceeds for real estate losses will be used only to repair or replace damaged real estate essential to the farming operation, make other essential real estate improvements, or pay any prior lien, including the purchase agreement; (3) the purchase agreement must provide the farmer with the right to possess, control, and use the property, and entitle the farmer to take title to the property upon fulfilling the contract; (4) the purchase contract must not be subject to summary cancellation on default and must not contain any provisions that jeopardize FSA's security position or the farmer's ability to repay the loan; (5) the seller must agree in writing not to sell or transfer the seller's interest without FSA's written consent, not to take out any additional liens against the property, to notify FSA of any breach by the farmer and to give FSA the option to resolve any breach before taking action against the farmer's interest in the property, and to consent to FSA making the loan and taking a security interest in the farmer's interest under the purchase agreement; and (6) the agreement must provide that if FSA acquires the farmer's interest in the property, it will not have assumed the farmer's obligations under the agreement.³²⁴

c. Required Lien Position for Chattel Security

FSA must get a first lien on any chattel that is being acquired or produced with EM loan funds.³²⁵ In any case, FSA's lien position must be equal to or higher than the lien position held by any creditor being refinanced with the loan funds.³²⁶

5. Same Collateral for Two Loans Possible

The same collateral may be used to secure two or more FSA loans made to the same borrower.³²⁷ For example, a junior lien on property serving as collateral for an FSA Farm Ownership (FO) loan could be acceptable security for an EM loan.

³²³ 7 C.F.R. § 764.104(a) (2019); Direct Loanmaking Handbook, page 5-4, para. 92.B (June 21, 2019).

³²⁴ 7 C.F.R. § 764.104(b) (2019); Direct Loanmaking Handbook, pages 5-5 through 5-6, para. 92.C (June 21, 2019).

³²⁵ 7 C.F.R. §§ 764.355(b), 764.255(b) (2019).

³²⁶ 7 C.F.R. § 764.255 (b)(2) (2019).

³²⁷ 7 C.F.R. §§ 764.104(d), 764.105 (2019); Direct Loanmaking Handbook, page 5-3, para. 91.F (June 21, 2019).

6. Establishing the Value of Security Property

In determining whether a farmer has sufficient security for an EM loan, how property is valued can be very important. The EM loan regulations set out how real estate and chattel property will be valued for this purpose, defining “security value” to be the market value of the property on the date of loan closing, minus any prior liens.³²⁸ The regulations define market value to be the amount that an informed and willing buyer would pay to an informed and willing seller in a completely voluntary sale.³²⁹

a. Security Value of Real Estate

The value of real estate security for EM loans usually must be established through a real estate appraisal by FSA that conforms to the Uniform Standards of Professional Appraisal Practice and FSA’s own appraisal requirements.³³⁰

If certain requirements are met, FSA State Executive Directors may waive the real estate appraisal requirement for farmers who are receiving only an EM loan.³³¹ First, specific conditions under which an appraisal may be waived must be established, and the waiver must be available to all farmers meeting those conditions. Second, if the value of the appraisal is more than \$50,000, the estimated security value must be established by someone other than the loan approval official. Third, procedures must be established to allow the farmer to dispute the estimated security value and have an appraisal completed.

b. Security Value of Livestock and Equipment

The value of livestock and equipment is determined by FSA according to FSA appraisal requirements.³³²

c. Security Value of Annual Commodity and Livestock Production

The security value of a farmer’s annual crop and livestock production is presumed to be 100 percent of the amount loaned for annual family living and farm operating expenses.³³³

d. Security Value of Property Damaged by the Disaster

The value of disaster-damaged farm assets that are pledged as collateral for an EM loan will be the value of those assets as established for the day before the disaster occurred.³³⁴

³²⁸ 7 C.F.R. § 761.2, “Security value” (2019).

³²⁹ 7 C.F.R. § 761.2, “Market value” (2019).

³³⁰ 7 C.F.R. §§ 764.107(a), 761.7(b) (2019); Direct Loanmaking Handbook, page 5-14, para. 95.A (June 21, 2019).

³³¹ Direct Loanmaking Handbook, page 10-28, para. 248.A (June 21, 2019).

³³² 7 C.F.R. § 764.107(b)(2) (2019); Direct Loanmaking Handbook, page 5-15, para. 95.A (June 21, 2019). FSA appraisal requirements can be found at 7 C.F.R. § 761.7 (2019).

³³³ 7 C.F.R. § 764.107(b)(1) (2019); Direct Loanmaking Handbook, page 5-15, para. 95.A (June 21, 2019).

³³⁴ 7 U.S.C. § 1964(d)(1); 7 C.F.R. § 764.356(b) (2019); Direct Loanmaking Handbook, page 10-29, para. 248.B (June 21, 2019).

7. Title Requirements for Real Estate Security

If real estate is given as security for an EM loan and the loan amount is more than \$25,000, FSA must obtain title clearance on the property.³³⁵ If real estate is given as security for an EM loan and the loan amount is \$25,000 or less, FSA must receive a certification of ownership.³³⁶ The certification of ownership can be an affidavit signed by the farmer that names the record owner of the real estate and lists the balances due on all known debts against the property. If the FSA official responsible for approving the loan is uncertain about the record owner or the debts against the real estate security, a title search will be required.

XI. EM Loan Application, Fees, Processing, and Denials

FSA has specific rules for applying for an EM loan. These include the fees that are assessed, how the applications are processed, and the process that FSA must follow if it denies an application.

A. Loan Application Requirements

An EM loan application requires filling out FSA's Request for Direct Loan Assistance, form FSA-2001.³³⁷ In addition to the completed application form, EM loan applications must generally include all of the following.³³⁸

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

³³⁵ 7 C.F.R. § 764.355(d) (2019); Direct Loanmaking Handbook, page 10-28, para. 247.A (June 21, 2019).

³³⁶ 7 C.F.R. § 764.355(e) (2019); Direct Loanmaking Handbook, page 10-28, para. 247.A (June 21, 2019).

³³⁷ Form FSA-2001, as well as other forms required for an EM application, can be found at: <https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/emergency-farm-loans/index>.

³³⁸ 7 C.F.R. § 764.51(b) (2019); Direct Loanmaking Handbook, pages 3-5 through 3-10, para. 42.A (June 21, 2019).

- Payment to FSA for ordering a credit report concerning the farmer.
- A statement of loss or damage sustained from the disaster, using form FSA-2309 (Certification of Disaster Losses).

The regulations also permit FSA to request additional information from the farmer if needed to evaluate the application.³³⁹ Additional application requirements apply to entity applicants.³⁴⁰

Loan applications must be submitted in the name of the actual operator of the farm.³⁴¹ In those cases where two or more applicants apply jointly for a loan, FSA will consider the application to be from an entity applicant and the application requirements for entity applicants must be met.

B. Fees

The farmer will be responsible for paying all filing, recording, notary, lien search, and other fees necessary to process and close an EM loan.³⁴² These fees may be paid for out of the EM loan funds.³⁴³

C. Loan Application Processing

The FSA loan regulations state that FSA will notify a farmer in writing—within ten calendar days of receiving the application—that the complete loan application has been received.³⁴⁴ Within sixty calendar days of receiving the farmer’s application, FSA must give the farmer written notification of its decision approving or denying the loan application.³⁴⁵ If the farmer’s application is approved, loan funds will be made available to the farmer within fifteen business days after loan approval—if the funds are available—unless the farmer agrees to a longer period.³⁴⁶

If the application received by FSA is incomplete, FSA must notify the farmer in writing within ten days of receiving the incomplete application.³⁴⁷ The farmer will have twenty calendar days from the date of the notice to provide the missing information. If this deadline

³³⁹ 7 C.F.R. § 764.51(b)(13) (2019). If the applicant has already submitted any of the required information to FSA and the information remains current, the farmer does not need to resubmit the information with his or her EM loan application. 7 C.F.R. § 764.51(g) (2019).

³⁴⁰ 7 C.F.R. § 764.51(b)(2) (2019); Direct Loanmaking Handbook, page 3-6, para. 42.A (June 21, 2019).

³⁴¹ 7 C.F.R. § 764.51(a) (2019); Direct Loanmaking Handbook, page 3-1, para. 41.B (June 21, 2019).

³⁴² 7 C.F.R. § 764.402(b) (2019); Direct Loanmaking Handbook, page 16-7, para. 373.A (June 21, 2019).

³⁴³ 7 C.F.R. § 764.151(d) (2019); Direct Loanmaking Handbook, page 7-3, para. 131.E (June 21, 2019).

³⁴⁴ 7 C.F.R. § 764.53(b) (2019); Direct Loanmaking Handbook, page 3-17, para. 45.C (June 21, 2019).

³⁴⁵ 7 C.F.R. § 764.53(c) (2019); Direct Loanmaking Handbook, page 15-1, para. 351.A (June 21, 2019).

³⁴⁶ 7 C.F.R. § 764.402(e)(1) (2019); Direct Loanmaking Handbook, page 15-7, para. 352.D (June 21, 2019).

³⁴⁷ 7 C.F.R. § 764.52(a) (2019); Direct Loanmaking Handbook, pages 3-14 through 3-15, para. 45.B (June 21, 2019).

is not met, FSA will inform the farmer in writing that the application will be withdrawn if the missing information is not provided within ten calendar days of the second notice.³⁴⁸

D. EM Loan Denials

A farmer must be notified in writing of an EM loan denial.³⁴⁹ The denial notice must: (1) set out clear, specific reasons for the denial; (2) give citations of regulations and handbook sections that were not satisfied in the farmer's application; (3) set out the farmer's rights to appeal the denial (as discussed below); and (4) include USDA's statement of nondiscrimination and equal credit opportunity.

XII. Reconsideration, Mediation, Appeals, and Equitable Relief for EM Loan Decisions

When a farmer has a dispute with FSA, or receives a denial of an EM loan application, the farmer may ask for reconsideration, seek mediation, appeal, or be eligible for equitable relief.³⁵⁰

A. Ask for Reconsideration

If a farmer receives an adverse decision on an EM loan application, the farmer may ask FSA to reconsider the decision.³⁵¹

B. Mediation

A farmer may seek mediation of a dispute with FSA related to an EM loan if the mediation program in the state where the farmer resides has been certified by USDA to hear agricultural credit disputes.³⁵²

C. Appeals

Farmers may appeal certain adverse decisions made by FSA about an EM loan.³⁵³ An adverse decision that is appealable may include, among other things, a determination that a farmer is not eligible for an EM loan, failure to process a loan application, or approval of a smaller loan amount than the farmer requested.³⁵⁴ EM loan appeals are handled by USDA's National

³⁴⁸ 7 C.F.R. § 764.52(b) (2019); Direct Loanmaking Handbook, page 3-16, para. 45.B (June 21, 2019).

³⁴⁹ Direct Loanmaking Handbook, page 15-15, para. 356.B (June 21, 2019).

³⁵⁰ For more detailed information on reconsideration, mediation, appeals, and equitable relief, see FSA Handbook, Program Appeals, Mediation, and Litigation, 1-APP (Rev. 2) (Sept. 12, 2016).

³⁵¹ 7 C.F.R. § 780.4(b) (2019); Direct Loanmaking Handbook, page 15-16, para. 356.C (June 21, 2019).

³⁵² 7 C.F.R. §§ 780.6, 780.9 (2019).

³⁵³ 7 U.S.C. § 6996(a); 7 C.F.R. §§ 780.6, 780.7 (2019).

³⁵⁴ An "adverse decision" is defined as a program decision by an employee, officer, or committee of FSA that is adverse to the participant. The term includes any denial of program participation, benefits, written agreements, eligibility, etc., that results in a participant receiving less funds than the participant believes should have been paid or not receiving a program benefit to which the participant believes the participant was entitled. 7 C.F.R. § 780.2, "Adverse decision" (2019). The term also includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations. 7 C.F.R. § 11.1, "Adverse decision" (2019).

Appeals Division (NAD).³⁵⁵ NAD regulations set out a formal appeals process with important deadlines and other requirements. For example, farmers must file their appeals with NAD within 30 days after they first receive notice of the adverse decision.³⁵⁶

Some decisions related to EM loans are not appealable. For example, decisions due to lack of funding, and decisions based on general program policies that are applicable to all similarly-situated applicants are not appealable.³⁵⁷

D. Equitable Relief Now Available with 2018 Farm Bill

With the passing of the 2018 Farm Bill, equitable relief may now be available to farmers who apply for EM loans but are denied for failure to comply with the program requirements.³⁵⁸ To qualify for equitable relief, the farmer must have acted in good faith, and must have relied on the actions or advice of an FSA employee to the detriment of the farmer's operation.³⁵⁹

FSA has the discretion to determine what type of equitable relief a farmer may receive. Such relief could include retaining the EM loan benefits for which the farmer was originally found to be noncompliant with, or any other relief that FSA determines is appropriate.³⁶⁰ If a farmer receives equitable relief, FSA may require that the farmer take specific actions to fix the noncompliance.³⁶¹

FSA's decision to grant or deny equitable relief is a final decision that may not be appealed.³⁶²

XIII. Discrimination Is Illegal

FSA is prohibited by the Equal Credit Opportunity Act (ECOA) from discriminating against any EM loan applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, the applicant's receipt of income from any public assistance program, or the applicant's exercise, in good faith, of any right under the Consumer Protection Act, which includes the ECOA.³⁶³ In addition to these prohibited bases for discrimination, general USDA regulations also prohibit discrimination in any program

³⁵⁵ 7 C.F.R. pt. 11 (2019). FSA regulations related to NAD appeals are set out at 7 C.F.R. pt. 780 (2019).

³⁵⁶ 7 C.F.R. § 11.6(a)(1) (2019).

³⁵⁷ 7 C.F.R. § 780.5(a) (2019); Appeals, Mediation, and Litigation Handbook, page 2-6, para. 11.A (Sept. 12, 2016).

³⁵⁸ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 5305(a) (2018) (codified at 7 U.S.C. § 2008a(a)).

³⁵⁹ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 5305(b) (2018) (codified at 7 U.S.C. § 2008a(b)).

³⁶⁰ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 5305(c) (2018) (codified at 7 U.S.C. § 2008a(c)).

³⁶¹ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 5305(d) (2018) (codified at 7 U.S.C. § 2008a(d)).

³⁶² Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 5305(e) (2018) (codified at 7 U.S.C. § 2008a(e)).

³⁶³ 15 U.S.C. § 1691(a).

administered by USDA on the basis of familial status, sexual orientation, disability, or because all or part of an individual's income is derived from any public assistance program.³⁶⁴

³⁶⁴ 7 C.F.R. § 15d.3(a) (2019).