

Farmers' Guide to Coronavirus Food Assistance Program (CFAP)

First Edition

May 29, 2020

Farmer Legal Assistance Hotline
877-860-4349

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(CFAP)

May 29, 2020

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Archived Edition

Chapter One: Introduction

This Farmers' Guide to the Coronavirus Food Assistance Program (CFAP) provides a description of the two main aspects of CFAP—the component of CFAP that provides direct payments to farmers (what this Guide calls the CFAP direct payments program, or simply CFAP for short) and the Farmers to Families Food Box Program.

I. Introduction

The CARES Act devoted significant resources to agriculture.¹ This Guide focuses on what USDA is calling the Coronavirus Food Assistance Program (CFAP). In particular, Chapter Two of this Guide provides details on the CFAP direct payments program, and Chapter Three discusses the Farmers to Families Food Box Program.

This Introduction describes the background of CFAP.

A. The CARES Act

On March 27, 2020, the CARES Act—technically known as the Coronavirus Aid, Relief, and Economic Security Act—became law.² The CARES Act did two main things that were designed to help farmers.

First, the CARES Act gave fourteen billion dollars to the Commodity Credit Corporation (CCC) to replenish its borrowing authority.³ This money will not be available to the CCC until after June 2020.⁴ The Act does not say how the money must be spent. The CCC is often used to support farmers with loans and purchases and payments.⁵

Second, the CARES Act gave the United States Department of Agriculture (USDA) 9.5 billion dollars.⁶ This is in addition to the fourteen billion dollars that goes to the CCC. USDA must spend this money to “prevent, prepare for, and respond to coronavirus by

¹ The CARES Act committed about 24.8 billion to food assistance in total. Much smaller amounts were committed to USDA operational needs, rural development programs, and other programs.

² Coronavirus Aid, Relief, and Economic Security Act (CARES Act), 116 Public Law 136, 134 Stat. 281 (March 27, 2020). As a bill, it was known as H.R. 748 (March 27, 2020). A copy can be found here: <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

³ CARES Act, § 11002.

⁴ CARES Act, § 11002; Coronavirus Food Assistance Program, CFAP Rule, 85 Fed. Reg. 30825, 30825, Final Rule (May 21, 2020) (prefatory comments) (to be codified at 7 C.F.R. part 9), at: <https://www.govinfo.gov/content/pkg/FR-2020-05-21/pdf/2020-11025.pdf>.

⁵ CARES Act funding may be used to replenish this 6.5 billion dollars, but for now USDA says that this portion of the CFAP funding is from the CCC and not CARES Act CCC money. See 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory remarks).” For a summary of the CCC, see Congressional Research Service, The Commodity Credit Corporation: In Brief, Report No. 44606 (September 4, 2019), at <https://fas.org/sgp/crs/misc/R44606.pdf>. For a USDA view of the role of the CCC, see FSA, Commodity Credit Corporation Fact Sheet (October 2015), at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2015/ccs_fact_sheet_oct2015.pdf. A recent use of CCC funds was Market Facilitation Program payments.

⁶ CARES Act, Division B, Title 1. USDA describes its understanding of CARES Act funding and its purpose at CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

providing support for agricultural producers impacted by coronavirus.” In other words, the 9.5 billion dollars must provide support for agricultural producers.⁷ Those agricultural producers must include: (1) producers of specialty crops; (2) producers that supply local food systems, including farmers markets, restaurants, and schools; and (3) livestock producers, including dairy producers. USDA, therefore, must include all of these producers in the spending of the 9.5 billion dollars. The CARES Act, however, does not say how much money should go to each type of producer, only that it must be used to prevent, prepare for, or respond to the coronavirus.

USDA is using its authority under the CARES Act, as well as other laws, to implement both the CFAP direct payments program as well as the Farmers to Families Food Box Program.⁸

B. USDA Coronavirus Food Assistance Program (CFAP)

On April 17, 2020, USDA announced how some of the CARES Act money will be spent—through a 19-billion-dollar program it is calling the Coronavirus Food Assistance Program (CFAP).⁹

Under the umbrella of CFAP are two separate programs.¹⁰ One program provides direct payments to eligible farmers. This Guide refers to this as the CFAP direct payments program (or simply CFAP, for short). Under a second program, called the Farmers to Families Food Box Program, the government will contract with local distributors to provide food boxes to eligible nonprofits and government entities.

1. CFAP Direct Payments

USDA intends for CFAP direct payments to give assistance to farmers affected by the COVID-19 crisis. It provides direct payments to eligible producers of eligible commodities.¹¹

As it stands now, about 16 billion dollars in total may be spent through CFAP for direct farmer payments.¹² According to USDA, about 9.5 billion dollars of that total comes to USDA as a result of the CARES Act, and will be used to support agricultural producers

⁷ CARES Act, Division B, Title 1.

⁸ Press Release, USDA Announces Coronavirus Food Assistance Program, Release Number 222.20 (April 17, 2020), at <https://www.usda.gov/media/press-releases/2020/04/17/usda-announces-coronavirus-food-assistance-program>.

⁹ Press Release, USDA Announces Coronavirus Food Assistance Program, Release Number 222.20 (April 17, 2020), at <https://www.usda.gov/media/press-releases/2020/04/17/usda-announces-coronavirus-food-assistance-program>.

¹⁰ Press Release, USDA Announces Coronavirus Food Assistance Program, Release Number 222.20 (April 17, 2020), at <https://www.usda.gov/media/press-releases/2020/04/17/usda-announces-coronavirus-food-assistance-program>.

¹¹ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

¹² CFAP Rule, 85 Fed. Reg. 30825, 30834 (to be codified at 7 C.F.R. § 9.5(k)); Press Release, USDA Announces Coronavirus Food Assistance Program, Release Number 0222.20 (April 17, 2020), at <https://www.usda.gov/media/press-releases/2020/04/17/usda-announces-coronavirus-food-assistance-program>; USDA, Coronavirus Food Assistance Program FAQ, “Many sources indicate the impact of COVID-19 on American agriculture will surpass \$40 billion. Why didn’t USDA provide more money to assist producers?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

to prevent, prepare for, and respond to COVID-19. The additional 6.5 billion dollars will come from existing CCC funds.¹³

2. Farmers to Families Food Assistance Program

Under a second CFAP program, the Farmers to Families Food Assistance Program, USDA will purchase about three billion dollars of fresh produce, dairy, and meat.¹⁴ The food will eventually result in boxes of fresh produce, dairy and meat to food banks, community and faith-based organizations, and other nonprofits.¹⁵

II. Current Through May 27, 2020

This Guide is current through May 27, 2020.

¹³ CFAP Rule, 85 Fed. Reg. 30825, 30834 (to be codified at 7 C.F.R. § 9.5(k) (2020)). Although the CARES Act gave 14 billion dollars to the CCC, that money will not be available until after June 2020. Accordingly, USDA has said that the 6.5 billion dollars in CCC CFAP funding is coming from existing CCC funds and not the CARES Act CCC money. See CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); see also USDA, Coronavirus Food Assistance Program FAQ, “Many sources indicate the impact of COVID-19 on American agriculture will surpass \$40 billion. Why didn’t USDA provide more money to assist producers?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

¹⁴ USDA Farmers to Families Food Box, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

¹⁵ For details on the Farmers to Families Food Box Program, see RFP—ERAcquisition (pdf), at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>. The National Sustainable Agriculture Coalition (NSAC) keeps track of this program. See, for example, National Sustainable Agriculture Coalition (NSAC) Blog, \$3 billion in Coronavirus Response Funds available to Food Hubs and Distributors to Provide Fresh Food Boxes to Those in Need (April 22, 2020), at: <https://sustainableagriculture.net/blog/3-billion-coronavirus-funds-for-food-hubs/>.

Chapter Two: CFAP Direct Payments

I. Introduction

The CFAP direct payments are intended to provide farmers with financial assistance that helps offset sales losses and increased marketing costs associated with the COVID-19 crisis.¹⁶ As part of this financial assistance, CARES Act funds will be used to partially compensate farmers for income losses. CCC funds, on the other hand, will be used to partially compensate farmers for the purchase of materials and facilities required for the production and marketing of agricultural commodities as well as the disposal of surplus commodities.

In practice, the two sources of funds have been combined into one program—CFAP direct payments—that uses one payment application and makes one payment to farmers.¹⁷

II. Authority and Rules for CFAP Direct Payments Program

CFAP direct payments will be implemented by the USDA Farm Service Agency (FSA).¹⁸ The USDA's Agricultural Marketing Service (AMS) will assist FSA.

The authority and rules for CFAP that are discussed in this Guide are found in several places.

A. Federal Statute—the CARES Act and the CCC Charter Act

The CARES Act provides authority for the USDA to assist farms who have suffered commodity and livestock losses due to price declines that occurred between mid-January 2020 and mid-April 2020.¹⁹ This includes specialty crops that were shipped but spoiled and no payment was received.²⁰ The CARES Act provides very few limits on the COVID-19 relief program that USDA was to create. USDA, in turn, decided to create CFAP. USDA says it will use CARES Act money to partially compensate farmers for income losses.²¹

Because part of the money for CFAP will go through the Commodity Credit Corporation (CCC), the federal statute governing CCC sets some limits on how the money can be used.²² In general, CCC authority is very broad. USDA says it will use CCC money to partially compensate farmers for increased marketing costs and the disposal of surplus commodities.²³

¹⁶ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

¹⁷ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

¹⁸ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

¹⁹ CARES Act, Division B—Emergency Appropriations for Coronavirus Health Response and Agency Operations, Title I, Agricultural Programs, Office of the Secretary; see also USDA, Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap>.

²⁰ CARES Act, Division B—Emergency Appropriations for Coronavirus Health Response and Agency Operations, Title I, Agricultural Programs, Office of the Secretary.

²¹ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

²² For these limits under the CCC Charter Act, see 15 U.S.C. § 714c. The breadth of CCC authority is discussed in Congressional Research Service, The Commodity Credit Corporation: In Brief, Report No. 44606 (September 4, 2019), at: <https://fas.org/sgp/crs/misc/R44606.pdf>.

²³ USDA relies on 15 U.S.C. § 714b of the CCC charter for authority to create the CFAP program. CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments). USDA describes the use of CCC funds in CFAP as intended to “assist producers with the purchase of materials and facilities required in connection with the marketing of agricultural commodities and to remove surplus

The difference in the statutes affect how the money can be spent. USDA says it will track funds from CARES Act and CCC Charter Act separately.²⁴

B. USDA Regulations

Regulations for CFAP can be found in a final rule that appeared in the Federal Register on May 21, 2020.²⁵ Those regulations will eventually become a part of the Code of Federal Regulations.²⁶ USDA issued a version of the regulations before they appeared in the Federal Register.²⁷

C. Handbooks

FSA issues Handbooks that control many aspects of various FSA programs. FSA has issued a Handbook for CFAP.²⁸ FSA has also relied on other Handbooks to set part of the CFAP rules.²⁹

D. Notices

FSA sometimes issues what it calls Notices. These provide additional rules that govern FSA programs. Notices have a published date, as well as a disposal, or expiration, date.³⁰ This Guide includes Notices released to the public by USDA through May 27, 2020.

E. Other USDA Information

USDA sometimes sets policy for CFAP and other programs through the USDA website.³¹ Because Farm Service Agency (FSA) has been designated to run CFAP, some of this information is likely to be posted by FSA.³²

commodities from normal marketing channels that may be currently unavailable.” CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments). This somewhat strange wording tracks USDA’s legislative authority under the CCC Charter. See 15 U.S.C. § 714c. As is often noted, USDA believes it has a great deal of flexibility in its use of CCC funds.

²⁴ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments).

²⁵ See Coronavirus Food Assistance Program, CFAP Rule, 85 Fed. Reg. 30825, Final Rule (May 21, 2020) (to be codified at 7 C.F.R. pt. 9), at: <https://www.govinfo.gov/content/pkg/FR-2020-05-21/pdf/2020-11025.pdf>.

²⁶ CFAP regulations will be found at 7 C.F.R. Part 9.

²⁷ The USDA version of the rules appeared on the USDA website on May 19, 2020, but that version is no longer available. The final rule that was published on May 21, 2020 in the Federal Register is the current, official rule for CFAP. See CFAP Rule, 85 Fed. Reg. 30825 (May 21, 2020).

²⁸ See FSA Handbook, 1-CP, Coronavirus Food Assistance Program (May 22, 2019), at: https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a01.pdf.

²⁹ For example, some CFAP eligibility rules for foreign persons come from FSA Handbook, 5-PL (Amendment 6), Payment Eligibility, Payment Limitation, and Average Adjusted Gross Income – Agricultural Act of 2014 (October 2, 2019). FSA Handbooks can be found here: <https://www.fsa.usda.gov/programs-and-services/laws-and-regulations/handbooks/index>.

³⁰ See, for example, FSA Notice CFAP-4, “Coronavirus Food Assistance Program (CFAP)” (May 20, 2020). Notices may be downloaded from the FSA website. To search for downloadable FSA Notices, visit <https://www.fsa.usda.gov/FSA/notices>.

³¹ See, for example, Coronavirus and USDA Assistance to Farmers (May 24, 2020), at: <https://www.farmers.gov/coronavirus>; and see USDA, Coronavirus Food Assistance Program FAQ (May 20, 2020), at <https://www.farmers.gov/cfap/faq>.

³² See, for example, USDA Announces Details of Direct Assistance to Farmers through the Coronavirus Food Assistance Program (May 19, 2020), at <https://www.fsa.usda.gov/news-room/news->

III. The Logic of CFAP Direct Payments: Price Declines and Disrupted Markets

USDA had a great deal of flexibility in creating a program for farmers in the wake of COVID-19. The CFAP program has a certain way of understanding those losses, and it has a certain approach for helping farmers affected by COVID-19.

USDA says that CFAP is designed to assist farmers in two different types of situations. First, it is designed to assist farmers that have either suffered a five-percent-or-greater price loss over a certain time period due to COVID-19.³³ Price losses are assumed to be due to a decline in demand.

Second, according to USDA, CFAP is designed to assist farmers that have faced what USDA calls significant marketing costs for the farmers' inventory of production.³⁴ Marketing costs are assumed to be due to an oversupply of commodities or to lost demand caused by disruptions in shipping and marketing of commodities. The close of farmers markets, restaurants, and schools are examples of what USDA thinks of as a market disruption for farmers.³⁵

In sum, according to USDA, CFAP is intended to give support to farmers who suffered losses due to price declines and farmers that suffered losses due to marketing supply chains that were affected by COVID-19.

IV. Farmer Eligibility

To receive CFAP funds a farmer must satisfy certain eligibility requirements. The next sections explain these requirements.

A. Farmer Must be an Eligible Producer

To be eligible for CFAP, the farmer must be what USDA calls an eligible producer. In order for a farmer to be considered an eligible producer, the following rules must be followed.

1. Person or Legal Entity

An eligible producer can be a natural person.³⁶ An eligible producer can also be a legal entity.

a. Citizenship Status for Eligible Persons

An individual farmer must have a certain immigration or citizenship status to qualify as an eligible producer for CFAP.

[releases/2020/usda-announces-details-of-direct-assistance-to-farmers-through-the-coronavirus-food-assistance-program.](#)

³³ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); FSA Notice CFAP-4, page 1, para. 1.A (May 20, 2020).

³⁴ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); FSA Notice CFAP-4, page 1, para. 1.A (May 20, 2020).

³⁵ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

³⁶ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Producer"); CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 21, 2020). For the purposes of CFAP, USDA seems to consider a "person" to be a natural person, and not an entity such as a corporation or partnership.

(i) U.S. Citizen

An individual farmer can be an eligible producer if the farmer is a United States citizen.³⁷

(ii) Resident Alien

If the farmer is a person, the farmer can be an eligible producer if the farmer is a resident alien.³⁸ In general, that means a person must have a valid Form I-551 card.³⁹ These are commonly called Green Cards, though officially they are called Permanent Resident Cards.⁴⁰

(iii) Foreign Person

A foreign person may be an eligible producer under CFAP rules.⁴¹

For the purposes of CFAP, a foreign person is defined in USDA rules and has two parts.⁴² First, a foreign person is not a citizen the United States. Second, a person that that has a valid Form I-551 Card is not a foreign person.⁴³ Anyone else is a foreign person. In other words, a wide variety of immigrants can qualify as foreign persons under USDA rules.

In order to be eligible for CFAP as a foreign person, the farmer must be actively engaged in the farm.⁴⁴ Actively engaged, for this purpose, means

³⁷ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(1)); CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

³⁸ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(2)); CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020). For the purposes of CFAP, a resident alien is a “lawful alien,” as defined in 7 C.F.R. § 1400.3(b) (2020). See CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(2)).

³⁹ CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

⁴⁰ USDA rules sometimes refer to Form I-551 as a Resident Alien Card. FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020). Officially, it is known as the Permanent Resident Card. For general information regarding Form I-551, see U.S. Citizenship and Immigration Services, Green Card, at: <https://www.uscis.gov/green-card>.

⁴¹ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(6)); CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020). Rules found in 7 C.F.R. part 1400 apply to foreign person eligibility for CFAP, as do the rules in the FSA Payment Eligibility Handbook, 5-PL (October 2, 2019).

⁴² CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Foreign person”); FSA Payment Eligibility Handbook, 5-PL, page 3-2, para. 154.A, Exhibit 2, page 5, “Foreign Person” (October 2, 2019); 7 C.F.R. § 1400.401(a) (2020).

⁴³ USDA rules sometimes refer to Form I-551 as a Resident Alien Card. FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020). Officially, it is known as the Permanent Resident Card. For general information regarding the Form I-551, see U.S. Citizenship and Immigration Services, Green Card, at: <https://www.uscis.gov/green-card>.

⁴⁴ FSA Payment Eligibility Handbook, 5-PL, page 3-6.5, para. 155.5.A, and page 3-7, para. 156.B (October 2, 2019); 7 C.F.R. § 1400.401(b) (2020).

three things, all of which must be true in order for a foreign person to qualify for CFAP.

First, a farmer that is a foreign person under FSA rules must provide a substantial amount of active personal labor for the farm.⁴⁵ Active personal labor is defined by FSA, and means to personally provide physical activities needed for a farming operation.⁴⁶ The rules that define what it means to meet the heightened requirement of providing a substantial amount of active personal labor are confusing. On one hand, USDA says—in the prefatory comments to the regulation—that a foreign person must provide at least 400 hours in a calendar year of active personal labor or active personal management in order to satisfy this rule.⁴⁷ The official regulations, however, do not include this 400-hour rule and instead provide a different standard for what it means to provide a substantial amount of active personal labor.⁴⁸ As of now, it is unclear which standard USDA will apply to foreign persons seeking eligibility for CFAP.

Second, a farmer that is a foreign person under FSA rules must provide capital for the farm.⁴⁹ Capital, for this purpose, is defined by FSA.⁵⁰ In general, capital means the funding provided to the farming operation in order to conduct farming activities.⁵¹ Capital does not include labor or management, or spending for land and equipment.

Third, a farmer that is a foreign person must provide land for the farm.⁵² The land can be leased by the foreign person.⁵³

⁴⁵ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); FSA Payment Eligibility Handbook, 5-PL, page 3-6.5, para. 155.5.A (October 2, 2019); 7 C.F.R. § 1400.401(b) (2020).

⁴⁶ 7 C.F.R. § 1400.3(b), “Active personal labor” (2020); FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 1, “Active Personal Labor” (October 2, 2019). This includes land preparation, cultivating, harvesting, and marketing the commodities from the farm. Active personal labor also includes physical activity needed in a livestock operation.

⁴⁷ See CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments). The definition of active personal management can be found at 7 C.F.R. § 1400.3(b), “Active personal management” (2020).

⁴⁸ The existing regulations state that a substantial amount of active personal labor can be met by working the lesser of either 1,000 hours in a calendar year or 50 percent of the total hours needed to conduct a farming operation that is comparable in size to the person’s share in the farming operation. See 7 C.F.R. § 1400.3(b), “Substantial amount of active personal labor” (2020).

⁴⁹ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); FSA Payment Eligibility Handbook, 5-PL, page 3-7, para. 156.B (October 2, 2019); 7 C.F.R. § 1400.401(a) (2020).

⁵⁰ 7 C.F.R. § 1400.3(b), “Capital” (2020); FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 1, “Capital” (October 2, 2019).

⁵¹ 7 C.F.R. § 1400.3(b), “Capital” (2020). Capital must be a direct out of pocket or borrowed input for the farm. The capital must come from a fund or account that is separate from anyone else involved in the operation. The input may not include advance program payments.

⁵² CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); FSA Payment Eligibility Handbook, 5-PL, page 3-7, para. 156.B (October 2, 2019); 7 C.F.R. § 1400.401(a) (2020).

⁵³ 7 C.F.R. § 1400.3(b), “Land” (2020). The land can be leased from another person with a legal interest in the farm if it is leased at fair market value.

b. Eligible Legal Entities

A number of legal entities can be eligible producers for CFAP.

(i) Partnership

A partnership can be an eligible producer.⁵⁴ All of the partners in the partnership must be citizens of the United States. A joint venture may also be eligible for CFAP.⁵⁵

(ii) Tribe or Tribal Organization

An eligible producer can be an Indian Tribe or a Tribal organization.⁵⁶

(iii) Corporation, LLC, or Other Structure

An eligible producer can be a corporation, a limited liability company (LLC), or another organizational structure organized under state law.⁵⁷

(iv) Foreign Entity

A foreign entity can be an eligible producer for CFAP.⁵⁸

For the purpose of CFAP producer eligibility, a foreign entity is a corporation, trust, estate, or other similar organization that has more than 10 percent of its beneficial interest held by foreign persons.⁵⁹ As stated

⁵⁴ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(3)); CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

⁵⁵ See CFAP Rule, 85 Fed. Reg. 30825, 30839 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1)).

⁵⁶ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(5)); CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020). A tribal organization, for this purpose, is defined in the Indian Self-Determination and Education Assistance Act. See 25 U.S.C. § 5304(e), (l). In general, an Indian tribe is any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. In general, a tribal organization is defined as: (1) the recognized governing body of an Indian tribe; and (2) any legally established organization of which is controlled, sanctioned, or chartered by a tribe or which is democratically elected by the adult members of the Indian community to be served by the organization.

⁵⁷ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(4)); CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

⁵⁸ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(6)); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020). Foreign entity eligibility is controlled by FSA Payment Eligibility Handbook, 5-PL (October 2, 2019) and 7 C.F.R. part 1400 (2020).

⁵⁹ FSA Payment Eligibility Handbook, 5-PL, page 3-5, para. 155.A, Exhibit 2, page 5 "Foreign Entity"; 7 C.F.R. § 1400.401(b)(1) (2020).

above, foreign persons means people who are not citizens of the United States and who do not have a valid Form I-551 Card.

FSA rules explain how to calculate the percentage of beneficial interest held by a foreign person.⁶⁰ In general, if there is only one class of stock, or some similar unit of ownership, FSA looks to the percentage of shares that are owned by a foreign person. If there is more than one class of stock or other similar unit, FSA will look to the percentage of the fair market value of the stock that is owned by a foreign person.

In order to be eligible for CFAP as a foreign entity, each foreign person who is a stockholder, partner, or some other type of member of the entity must provide active personal labor for the farm.⁶¹ To provide active personal labor means to provide physical activities needed for a farming operation.⁶²

If an entity is owned in whole or in part by a foreign person, the entity will only be eligible for a CFAP payment that reflects the foreign person's interest in the entity if the foreign person provides a substantial amount of active personal labor for the farm.⁶³ As explained above, it is unclear what exactly it means for a foreign person to provide a substantial amount of active personal labor for a farm.

2. Share in Risk and Entitled to Share of Crop or Livestock

USDA rules require that eligible producers meet two requirements in terms of their relationship to their crops or livestock—they must share in the risk of producing the

⁶⁰ FSA payment Eligibility Handbook, 5-PL, pages 3-5 through 3-8, 4-155 through 4-156, paras. 155.B-E, 157.A, 228 (October 2, 2019); 7 C.F.R. 1400.401(b)(1)-(5) (2020). The calculation is based on the higher of either the percent of beneficial interest at the time the CFAP agreement is signed or executed, or the beginning harvest date for the commodity. 7 C.F.R. 1400.401(b)(1)-(5) (2020). FSA notes that all interest in an entity, including an interest in an embedded entity, are taken into account. FSA Payment Eligibility Handbook, 5-PL, page 3-5, para. 155.B (October 2, 2019). An embedded entity is defined in FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 4, "Embedded legal entity" (October 2, 2019). FSA rules also say that in some cases FSA may decide that an ownership interest of 10 percent or less may still count as a beneficial interest. FSA Payment Eligibility Handbook, 5-PL, page 3-6, para. 155.D (October 2, 2019). The rules do not say how or why that determination might be made. If the entity later increases in foreign ownership percentage, the entity must inform FSA. FSA Payment Eligibility Handbook, 5-PL, page 3-6, para. 155.E (October 2, 2019). General FSA rules say that in this case the entity may be required to refund the payment. If an entity does not meet the requirements of the foreign entity rule, payment may be reduced and not completely denied.

⁶¹ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); FSA Payment Eligibility Handbook, 5-PL, pages 3-6.5, 3-7, paras. 155.5.A, 156.B (October 2, 2019); 7 C.F.R. § 1400.401(b)(2) (2020).

⁶² 7 C.F.R. § 1400.3(b), "Active personal labor" (2020); FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 1, "Active Personal Labor" (October 2, 2019). This includes land preparation, cultivating, harvesting, and marketing the commodities from the farm. Active personal labor also includes physical activity needed in a livestock operation.

⁶³ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments).

crops or livestock, and they must be entitled to a share in the sale of the crops or livestock.⁶⁴ This rule applies to both persons and entities, and the farmer must meet both of the requirements in order to be considered an eligible producer.

a. Share in Risk of Crop or Livestock

First, in order to be an eligible producer, the farmer must share in the risk of producing crops or livestock.⁶⁵ Sometimes USDA says that an eligible producer must have an ownership interest in the commodity.⁶⁶ From USDA's perspective, this might be thought of as the same thing as sharing in the risk of production.

b. Entitled to Share of Crop or Livestock

Second, in order to be an eligible producer, the farmer must be entitled to a share in the sale of the crop or livestock.⁶⁷ If it turns out the farmer would have had a share of the crop or livestock, but the crop or livestock was not actually produced and marketed, that still counts as being entitled to a share.

An important and somewhat confusing issue concerns the timing of the farmer's share in the crop or livestock. This timing can determine whether the farmer is considered an eligible producer for CFAP. USDA rules set out two different timeframes for meeting this eligibility requirement, depending on whether the eligible producer is a dairy farmer or a farmer of any other eligible commodity.

(i) Timing of Share for Dairy—January, February, March of 2020

For a dairy farmer to be an eligible producer, the farmer must have a share in the commodity for the months of January, February, and March

⁶⁴ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Producer"); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); CFAP Handbook, Exhibit 2, page 2, "Producer" (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); Coronavirus Foods Assistance Program FAQ (Who is eligible to participate in the Coronavirus Food Assistance Program?).

⁶⁵ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Producer"); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); CFAP Handbook, Exhibit 2, page 2, "Producer" (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); Coronavirus Foods Assistance Program FAQ (Who is eligible to participate in the Coronavirus Food Assistance Program?).

⁶⁶ See, for example, CFAP Handbook, page 2-2, para. 15.B, and page 2-12, para. 21.A (May 22, 2020); FSA Notice CFAP-4, pages 3, 5, 9 paras. 2.A, 2.D, 4.A (May 20, 2020).

⁶⁷ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Producer"); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 6-2, para. 165.C, "Producer" (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); Coronavirus Foods Assistance Program FAQ (Who is eligible to participate in the Coronavirus Food Assistance Program?).

of 2020.⁶⁸ It seems that the farmer needs to have maintained that interest for the entire three months.

(ii) Timing of Share for All Other Commodities—Two Acceptable Timeframes

For all eligible commodities except for dairy, a farmer must have had a share in crops or livestock during at least one of two time periods.⁶⁹ Meeting either one makes the farmer an eligible producer.

(a) January 15, 2020

For all commodities except for dairy, if the farmer had a share in an eligible commodity on January 15, 2020, that farmer can qualify as an eligible producer.⁷⁰

(b) Between April 16, 2020 and May 14, 2020

For all commodities except for dairy, if the farmer had a share in an eligible commodity between April 16, 2020, and May 14, 2020, the farmer can qualify as an eligible producer.⁷¹ This could mean that if the farmer had a share any time between April 16, 2020 and May 14, 2020, the farmer can be an eligible producer. If true, the farmer would not have needed to have a share of the commodity for the entire time between April 16, 2020, and May 14, 2020.

c. Examples of the Risk and Share Eligibility

The following examples may help to clarify how the risk and share requirements affect a farmer's eligibility for CFAP.

(i) Farmer with a Contract to Sell—Can be Eligible

If a farmer has a contract to sell produce to a buyer, and the farmer bears the loss if the crop fails, the farmer has a risk in the production and could be an eligible producer under CFAP.

⁶⁸ CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(c)). The Federal Register does not include a different rule for dairy.

⁶⁹ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(c)); CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020).

⁷⁰ CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(c)). The Federal Register does not include a different rule for dairy.

⁷¹ CFAP Handbook, page 2-1, para. 15.A (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(c)). The Federal Register does not include a different rule for dairy.

(ii) Farmer Who is a Hired Laborer—Not Eligible

If a person was hired as a laborer to raise crops for an hourly wage or work with livestock for an hourly wage, that person is not an eligible producer for that crop or livestock because the person does not bear the loss if the crops fail or the livestock are lost. It is also likely the person would not have an ownership interest in the crops or livestock, which would make the person ineligible for CFAP.

(iii) Farmer Performing Custom Field Work—Not Eligible

If a person does custom field work, such as baling hay, that person is not an eligible producer under CFAP for the hay because the farmer does not bear the loss if the hay crop fails. It is also likely the person would not have an ownership interest in the crops, which means the person cannot be eligible for CFAP.

(iv) Contract Growers—Some Not Eligible

A more complicated question concerns farmers who grow on contract.

The answer to this question rests in part on the contract itself. Many farmers raise commodities with a contract to deliver the commodity to a buyer. If the contract calls for the farmer to raise and own the commodity and then deliver it for sale, that farmer can be an eligible producer under CFAP because the farmer bears the risk of raising the commodity and has an ownership interest in the commodity.

Thousands of farmers—especially poultry farmers, and in some cases hog farmers—produce under contracts that call for the integrator to own the livestock. An important question, then, is when and if a contract grower that does not own the livestock can ever be an eligible producer under CFAP. The USDA regulation defining eligible producer says that a contract grower that does not own the livestock can be an eligible producer if the contract “allows the grower to have risk in the livestock.”⁷²

The regulation does not define what it might mean to have risk in the livestock. Arguably, risk in livestock for a poultry or hog grower could mean the contract grower suffers a financial loss if the animal dies or does not add weight well. The USDA website, however, provides a more narrow definition by stating that a contract grower can only be an eligible producer if the contract “allows the grower to have price risk in the livestock.”⁷³ This seems to mean that in order for a contract grower to be

⁷² CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Producer”); see also CFAP Handbook, page 6-21, para. 176.A, and Exhibit 2, page 2, “Producer” (May 22, 2020).

⁷³ USDA, Coronavirus Foods Assistance Program FAQ, “Who is eligible to participate in the Coronavirus Food Assistance Program?”

an eligible producer, the payment that the grower receives must move up or down depending on the market price for the livestock.

For poultry producers in particular, the payment calculations in poultry contracts are famously confusing—likely intentionally so.⁷⁴ Even with CFAP's more narrow definition of eligible producer for contract growers, a contract poultry grower would have a good argument for being eligible if the contract hinged in some way on the market price of poultry or poultry products. The problem for poultry contract growers, however, is that at present poultry appears not be an eligible form of livestock under CFAP.⁷⁵ Livestock eligibility is discussed in detail below.

3. Additional Eligibility Requirements

In order to be considered eligible producers under CFAP, farmers must also comply with the following rules.

a. Conservation Compliance

A farmer applying for CFAP must meet what are known as conservation compliance requirements.⁷⁶ In general, this means that the farmer will not produce an agricultural commodity on highly erodible soil without a conservation plan, will not plant an agricultural crop on a converted wetland, and will not convert a wetland in order to produce an agricultural commodity.⁷⁷ The farmer will need to certify conservation compliance when applying for CFAP.⁷⁸ This requirement, which will be new for farmers that have not worked with USDA in the past, is discussed in more detail below.

⁷⁴ For one description of how poultry contracts work, see James M. McDonald, Technology, Organization, and Financial Performance in U.S. Broiler Production, USDA Economic Research Service, Economic Information Bulletin Number 126 (June 2014), at: https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=8717.9. for a FLAG look at poultry contracts see SHOULD WE DO THIS ; something from RAFI?

⁷⁵ For example, the USDA website lists eggs and layers as being ineligible for CFAP. See USDA, Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap>.

⁷⁶ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); CFAP Handbook, page 2-2, para. 15.B, and page 2-8, para. 18.A (May 22, 2020); FSA Notice CFAP-4, pages 5, 7, paras. 2.D, 3.E, and Exhibit 1, page 1 (example of Form AD3114) (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “Do the Farm Bill’s conservation compliance requirements apply to CFAP?” (May 20, 2020); USDA, Coronavirus Food Assistance Program, CFAP Eligibility (May 21, 2020). Additional rules for conservation compliance that eligible producers must follow can be found at 7 C.F.R. Part 12.

⁷⁷ 7 C.F.R. § 12.1(a) (2020).

⁷⁸ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)); CFAP Handbook, page 2-8, para. 18.A (May 22, 2020); FSA Notice CFAP-4, page 7, para. 3.E (May 20, 2020).

b. Compliance with Adjusted Gross Income (AGI) Limitation

USDA programs sometimes condition eligibility on what are known as adjusted gross income (AGI) limitations.⁷⁹ These AGI limits apply to CFAP.⁸⁰

USDA provides an explanation of how the AGI rule applies to CFAP.⁸¹ In general, no person or legal entity, other than a joint venture or partnership, may receive CFAP payments if their average AGI is more than 900,000 dollars.⁸² For joint ventures and partnerships, the average AGI limitation is applied to each member of the business.

The AGI limitation does not apply if at least 75 percent of the eligible producer's average AGI is from farming, ranching, or forestry-related activities.⁸³

c. Compliance with Controlled Substance Rules

To be eligible for a CFAP payment, a farmer must comply with certain controlled substance rules.⁸⁴ This means that a person that is convicted of a controlled substance violation will be ineligible, at least for a time, for CFAP.⁸⁵ In particular, the conviction cannot be for planting, cultivating, growing, producing, harvesting, or storing a controlled substance.⁸⁶ As of 2018, with the passing of the Agriculture Improvement Act of 2018 (commonly known as the 2018 Farm Bill), some hemp production will not trigger this restriction because hemp is no longer classified as a Schedule I controlled substance.⁸⁷

⁷⁹ For general AGI rules see, 7 C.F.R. pt. 1400 (2020); FSA Handbook, 5-PL (Amendment 6), Payment Eligibility, Payment Limitation, and Average Adjusted Gross Income–Agricultural Act of 2014, pages 6-1 to 6-62, paras. 291-312 (October 2, 2019).

⁸⁰ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(d)); CFAP Handbook, page 2-7, para. 17.A (May 22, 2020); Notice CFAP-4, page 6, para. 3.D (May 20, 2020).

⁸¹ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory remarks); see also CFAP Handbook, page 2-7, para. 17.A (May 22, 2020).

⁸² This number is for the 2020 program year. The average to be used comes from tax years 2016, 2017, and 2018. CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(d)); CFAP Handbook, page 2-7, para. 17.A (May 22, 2020); Notice CFAP-4, page 6, para. 3.D (May 20, 2020).

⁸³ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(d)); CFAP Handbook, page 2-7, para. 17.A (May 22, 2020); Notice CFAP-4, page 6, para. 3.D (May 20, 2020).

⁸⁴ CFAP Handbook, page 2-9, para. 18.B (May 22, 2020); FSA Notice CFAP-4, page 7, para. 3.E (May 20, 2020).

⁸⁵ USDA, Coronavirus Food Assistance Program, CFAP Eligibility (May 21, 2020). The rules found in FSA Handbook, Common Management and Operating Provisions, 1-CM (Revision 3), pages 30-1 and 30-2, para. 871 (January 2, 2020) and in 7 C.F.R. §§ 718.2, “Controlled substances,” 718.6 (2020) apply. See CFAP Handbook, page 2-7, para. 17.A (May 22, 2020). Controlled substance is defined in 21 C.F.R. part 1308 (2020). A person convicted of a controlled substance violation could be ineligible for CFAP payments for the year in which the conviction took place, as well as the next four years. See FSA Handbook, 1-CM, page 30-1, para. 871.C (January 2, 2020).

⁸⁶ 7 C.F.R. § 718.6(b) (2020).

⁸⁷ See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12619 (Dec. 20, 2018) (to be codified at 21 U.S.C. § 802(16)). The applicable definition of “hemp” is found at 7 U.S.C. § 16390(1); see also FSA Handbook, 1-CM, page 30-1, para. 871.B (January 2, 2020). For more discussion of hemp, see

B. When Farmers are Not Eligible for CFAP

USDA rules set out several types of farmers and farming operations that are not eligible for CFAP payments. These are discussed below.

1. No Ownership Interest in Eligible Crop or Livestock

A farmer, including a person or legal entity, that does not have a reported ownership interest in an eligible crop or livestock is not eligible to receive a CFAP payment.⁸⁸ Sometimes USDA refers to eligible producers as those having a share in the risk of producing a crop or livestock or those who are entitled to a share of the crop.⁸⁹ From USDA's perspective, these may mean the same thing as having an ownership interest.

2. Suspended, Debarred, or Excluded from Federal Programs

A farmer that has been suspended, debarred, or otherwise excluded from participating in federal programs is not eligible for CFAP.⁹⁰ Suspended and debarred people are banned from a broad range of government programs.⁹¹ Suspension and debarment can occur for things like criminal or civil judgments for fraud and the willful failure of someone to perform certain agreements made with the government.⁹² Relatively few people will be affected by this restriction. It is not, for example, triggered by delinquency on FSA loans or loan forgiveness.

3. Public Schools

Public schools are not eligible to receive payments under CFAP.⁹³ Public schools are defined under FSA rules.⁹⁴ A public school can be a primary, elementary, or secondary school. A public school can also be a college or university. To be defined as a public school, at least one of two things must be true. First, if the school is directly administered under the authority of a governmental body it counts as a public school. Second, if the school receives "a predominant amount of its financing" from public

USDA, Office of General Counsel, Memorandum: Executive Summary of New Hemp Authorities (May 28, 2019), at <https://www.ams.usda.gov/sites/default/files/HempExecSumandLegalOpinion.pdf>.

⁸⁸ CFAP Handbook, page 2-2, para. 15.B (May 22, 2020); FSA Notice CFAP-4, pages 3, 5, 9 paras. 2.A, 2.D, 4.A (May 20, 2020).

⁸⁹ FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments)

⁹⁰ CFAP Handbook, page 2-2, para. 15.B (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.D (May 20, 2020). The Handbook and Notice incorporate the rules in FSA Handbook, Common Management and Operating Provisions, 1-CM (Revision 3) (January 2, 2020). The 1-CM Handbook, in turn, incorporates additional rules from the Office of Management and Budget (OMB), which are found in 2 C.F.R. part 180, and from USDA, found at 2 C.F.R. part 417. See Common Management Handbook, pages 29-4, 29-5, paras. 823.A (January 2, 2020).

⁹¹ A suspension is short term, debarment can last longer. For definitions, see 2 C.F.R. §§ 180.925, 180.1015 (2020). For timing, see 2 C.F.R. § 417.865 (2020).

⁹² For USDA rules, see 2 C.F.R. § 417.800(a)-(d) (2020). USDA incorporates lengthy rules for suspension and debarment issued by OMB and found in 2 C.F.R. part 180, subparts F, G, H, I (2020).

⁹³ CFAP Handbook, page 2-2, para. 15.B (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.D (May 20, 2020). The CFAP Notice incorporates the definitions in the FSA Payment Eligibility Handbook, 5-PL (October 2, 2019).

⁹⁴ FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 7, "Public School" (October 2, 2019).

funds it is defined as a public school.⁹⁵ Predominant amount is not defined in FSA rules. A predominant amount probably means the majority.⁹⁶ These rules suggest that a private school could be an eligible producer under CFAP.

Although the rules do not say so directly, someone who farms on land rented from a public school would seem to be eligible for CFAP payments.

4. Governments

Federal, state, and local governments may not be eligible producers under CFAP.⁹⁷

Although the rules do not say so directly, someone who farms on land rented from a government would seem to be eligible for CFAP payments.

V. Commodity Eligibility

CFAP payments are limited to certain eligible commodities. Both crops and livestock can be eligible commodities for purposes of CFAP.⁹⁸

The following sections describe the rules and USDA decisions regarding eligible commodities. The extent to which USDA might change these decisions based on new information is also discussed.

A. Commodity Defined

For the purposes of CFAP direct payments, an eligible commodity must meet the following four requirements.⁹⁹

1. Produced in the United States

An eligible commodity is an agricultural commodity that is produced in the United States.¹⁰⁰ Imported commodities, which are not used in calculating a CFAP payment, are not eligible.¹⁰¹

⁹⁵ FSA rules note that a public school includes state universities. See FSA Payment Eligibility Handbook, 5-PL, page 4-7, para. 174.B (October 2, 2019).

⁹⁶ Predominant can mean something greater or superior in power and influence when compared with something else. Blacks' Law Dictionary (4th ed. 1951). Predominance can also mean numerical superiority. See Webster's Third New International Dictionary Unabridged (1986).

⁹⁷ CFAP Handbook, page 2-2, para. 15.B (May 22, 2020); FSA Notice CFAP-4, page 5, para. 2.D (May 20, 2020). The CFAP Notice incorporates the definitions in The FSA Notice incorporates the definitions in FSA Handbook, 5-PL, Payment Eligibility Handbook (October 2, 2019).

⁹⁸ CFAP Handbook, page 2-12, para. 21.A (May 22, 2020). Crops are defined by USDA to include both specialty crops and non-specialty crops. CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Crops").

⁹⁹ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Commodity"); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020).

¹⁰⁰ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Commodity"); CFAP Handbook, page 3-2, para. 50.B, and Exhibit 2, page 1, "Commodity" (May 22, 2020).

¹⁰¹ CFAP Rule, 85 Fed. Reg. 30825, 30830 (May 21, 2020) (to be codified at 7 C.F.R. § 9.1(a)).

2. Intended to be Marketed for Commercial Production

A commodity must be intended to be marketed for commercial production in order to be eligible for CFAP.¹⁰² While USDA does not say so directly, this probably means that crops intended to be fed to livestock are not eligible commodities under CFAP. It also probably means that commodities raised for home consumption are not eligible commodities. It is likely that as long as the original intention was to raise the commodity to be sold—even if it was ultimately used in some other way, or not used at all—it likely will be considered an eligible commodity.

3. Subject to Price Risk

An eligible commodity must be subject to price risk, or what USDA sometimes calls unpriced inventory.¹⁰³ This means that as of January 15, 2020, the commodity cannot be subject to an agreed-upon future price, either through a forward contract, agreement, or similar binding document.¹⁰⁴ The commodity must still be at risk of price fluctuations after January 15, 2020 in order to be eligible for payment.¹⁰⁵

4. Designated by USDA as Eligible for CFAP

The definition of commodity requires that it be designated by USDA as eligible for payment under CFAP.¹⁰⁶ USDA has created lists of commodities that are currently eligible.¹⁰⁷ A number of commodities raised by farmers in the United States are not included. The sections below list and define the commodities that are now eligible, and then discusses if and how commodities might be added to the eligible commodity list.

B. USDA Sets Eligibility on a Commodity-by-Commodity Basis

USDA determines the eligibility of commodities on a commodity-by-commodity basis and is making an across-the-board decision about each commodity. In other words, for each commodity—for example, corn—the commodity is either eligible for CFAP or not eligible. That determination applies to every farmer that raises corn. It turns out that USDA decided corn is eligible. On the other hand, USDA decided that bison are not an eligible

¹⁰² CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Commodity”); CFAP Handbook, page 3-2, para. 50.B, and Exhibit 2, page 1, “Commodity” (May 22, 2020). Intended use means the end use for which the crop or commodity was grown and produced. CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2); 7 C.F. R. 718.2, “Intended use” (2020).

¹⁰³ FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What does ‘unpriced’ or ‘subject to price risk’ mean?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

¹⁰⁴ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Unpriced inventory”); CFAP Handbook, page 2-16, para. 22.A, and Exhibit 2, page 2, “Subject to Price Risk” (May 22, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What does ‘unpriced’ or ‘subject to price risk’ mean?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>. For examples of forward contracts, see CFAP Handbook, pages 5-26 through 5-29, para. 138.F (May 22, 2020).

¹⁰⁵ CFAP Handbook, page 2-16, para. 22.A (May 22, 2020). The Handbook does not state for how long the commodity must be at risk of price fluctuations.

¹⁰⁶ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Commodity”); CFAP Handbook, Exhibit 2, page 1, “Commodity” (May 22, 2020).

¹⁰⁷ See, for example, CFAP Handbook, page 2-12, para. 21.A (May 22, 2020).

commodity. This means that for all bison producers in the country, bison is not an eligible commodity, and no one can receive a CFAP payment that takes into account bison.

The process that USDA uses to determine which commodities are eligible for CFAP is confusing, and is discussed later in this Guide.

C. Eligible Commodities—As of May 27, 2020

The following sections describe the CFAP-eligible commodities as of May 27, 2020. This list will almost certainly change.

Each of the eligible commodities falls into one of the following categories: (1) dairy; (2) wool; (3) livestock, including cattle, swine and sheep; and (4) crops, including non-specialty crops, specialty crops and value-loss crops. The specific eligibility rules for each commodity is discussed briefly below.

1. Dairy

Dairy is an eligible commodity.¹⁰⁸ USDA appears to think of dairy as milk, and seems not to include other commodities sold by a dairy farmer—including selling bulls or cull cows.

2. Wool

Wool can be an eligible commodity under CFAP.¹⁰⁹ Wool is defined as the fiber sheared from live sheep. It includes both graded and ungraded wool.¹¹⁰ Graded wool is to be paid on a clean basis, and ungraded wool is paid on a greasy basis.

¹⁰⁸ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 4-1, para. 85.A (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What commodities and livestock are eligible?” (May 27, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (May 2020), at: https://www.farmers.gov/sites/default/files/documents/FSA_CFAP_Dairy_Fact%20Sheet-2020-5-26-20.pdf.

¹⁰⁹ CFAP Rule, 85 Fed. Reg. 30825, 30825-30826 (May 21, 2020) (prefatory comments); CFAP Handbook, pages 5-1 and 5-2, para. 125 (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020), at: https://www.farmers.gov/sites/default/files/documents/FSA_CFAP_Wool_Fact%20Sheet-2020.pdf.

¹¹⁰ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Wool”); CFAP Handbook, page 5-22, para. 137.B (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

3. Livestock

Livestock can be an eligible commodity under CFAP.¹¹¹ Several types of livestock are eligible for CFAP, so long as all other eligibility requirements are met.¹¹² In general, eligible livestock are cattle, swine, and sheep.¹¹³

The following sections outline the specific eligibility requirements for each type of livestock. Only those livestock listed below are currently eligible for CFAP.¹¹⁴

a. Cattle

Cattle can be an eligible commodity under CFAP.¹¹⁵ By cattle, USDA means commercially raised or maintained bovine animals.¹¹⁶

USDA has divided cattle into several separate eligible commodities.

(i) Feeder Cattle—Less Than 600 pounds

Feeder cattle that weigh less than 600 pounds count as a separate eligible commodity.¹¹⁷ USDA says this means cattle weighing less than 600 pounds.¹¹⁸

(ii) Feeder Cattle—600 Pounds or More

Feeder cattle that weigh 600 pounds or more count as a separate eligible commodity.¹¹⁹ To be eligible under this category, the cattle must weigh less than cattle in the category of Slaughter Cattle-Fed Cattle.¹²⁰

¹¹¹ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 6-23, para. 177.B (May 22, 2020); USDA, Livestock and the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap/livestock>; FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020), at: https://www.farmers.gov/sites/default/files/documents/FSA_CFAP_ForLivestock_Fact%20Sheet-2020-5-26-20.pdf.

¹¹² FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); Coronavirus Food Assistance Program FAQ, “What commodities and livestock are eligible?” (May 27, 2020).

¹¹³ CFAP Handbook, page 6-23, para. 177.B (May 22, 2020).

¹¹⁴ CFAP Handbook, page 6-22, para. 177.B (May 22, 2020).

¹¹⁵ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 6-23, para. 177.B (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹¹⁶ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Cattle”); CFAP Handbook, page 6-1, para. 165.C, “Cattle” (May 22, 2020).

¹¹⁷ CFAP Handbook, page 6-23, para. 177.B (May 22, 2020); CFAP Handbook, page 6-2, para. 165.C, “Feeder cattle less than 600 pounds” (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹¹⁸ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Feeder cattle less than 600 pounds”).

¹¹⁹ CFAP Handbook, page 6-23, para. 177.B (May 22, 2020); CFAP Handbook, page 6-2, para. 165.C, “Feeder cattle 600 pounds or more” (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹²⁰ This means the cattle must have an average weight of 1,400 pounds or less with an average carcass weight of more than 800 pounds. See CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Feeder cattle 600 pounds or more,” “Slaughter cattle-fed cattle”).

(iii) Slaughter Cattle—Fed Cattle

Slaughter Cattle—Fed Cattle count as a separate eligible commodity.¹²¹ By this, USDA means cattle with an average weight of over 1400 pounds and which yield average carcass weights of at least 800 pounds.¹²² The cattle should be intended for slaughter.¹²³

(iv) Slaughter Cattle—Mature Cattle

Culled cattle that were raised or maintained for breeding purposes, but which were removed from inventory and are intended for slaughter, are counted as a separate eligible commodity called Slaughter Cattle-Mature Cattle.¹²⁴ Cattle raised or maintained for breeding purposes means the cattle were commercially raised and maintained for use as a sire or dam for the production of livestock offspring or lactation.¹²⁵ This would appear to include beef cows used in a cow-calf operation. It would also seem to include a dairy bull.¹²⁶

(v) All Other Cattle—Does Not Include Bison, Beefalo, and Some Dairy

USDA has created a catch-all cattle category, which it calls All Other Cattle, that counts as a separate eligible commodity.¹²⁷ USDA defines this category to mean commercially raised or maintained bovine animals that do not fall within the other four cattle categories listed above.¹²⁸

Beefalo and bison are expressly excluded from this category and are not eligible as cattle for purposes of CFAP.¹²⁹

¹²¹ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Slaughter cattle–fed cattle”); CFAP Handbook, page 6-23, para. 177.B (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹²² CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Slaughter cattle–fed cattle”); CFAP Handbook, page 6-2, para. 165.C, “Slaughter cattle–fed cattle” (May 22, 2020). According to the CFAP Handbook, cattle with an average weight of 1,400 pounds includes cattle with a weight of 1,200 to 1,600 pounds.

¹²³ Intended use means the end use for which the crop or commodity was grown and produced. See 7 C.F.R. § 718.2, “Intended use” (2020).

¹²⁴ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Slaughter cattle–mature cattle”); CFAP Handbook, page 6-2, para. 165.C, “Slaughter cattle–mature cattle” (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹²⁵ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Cattle raised or maintained for breeding purposes”).

¹²⁶ Livestock that are no longer used for dairy production and entered the beef cattle market are eligible for CFAP, so long as all other eligibility requirements are met. CFAP Handbook, page 6-22, para. 177.B (May 22, 2020).

¹²⁷ CFAP Handbook, page 6-23, para. 177.B (May 22, 2020); CFAP Handbook, page 6-1, para. 165.C, “All other cattle” (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹²⁸ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “All other cattle”); CFAP Handbook, page 6-1, para. 165.C, “All other cattle” (May 22, 2020).

¹²⁹ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Cattle,” “All other cattle”); CFAP Handbook, page 6-1, para. 165.C, “Cattle” (May 22, 2020).

Similarly, animals used for dairy production or intended for dairy production do not fall within this category and are not considered cattle for CFAP purposes.¹³⁰ This seems to mean that if a dairy cow is raised to be milked, that cow cannot be considered cattle for the purposes of CFAP—even if the animal was eventually culled and sold to the stockyards. On the other hand, this definition suggests that dairy breed animals raised on a dairy farm, but which were intended to be sold as steers, do count as cattle.

b. Swine—Hogs and Pigs

Swine—specifically hogs and pigs—can be eligible commodities for CFAP.¹³¹ For this purpose, hogs are defined as weighing 120 pounds or more.¹³² Pigs are defined as weighing less than 120 pounds.¹³³

c. Sheep—Lambs and Yearlings Only

Sheep can be an eligible commodity for CFAP. USDA has determined, however, that only lambs and yearlings are eligible for CFAP.¹³⁴ By lambs and yearlings, USDA means all sheep less than two years old.¹³⁵

d. Poultry—Not Eligible

Poultry are not listed as an eligible commodity. In addition, the USDA website expressly states that eggs and layers are not eligible commodities.¹³⁶ Because eligible commodities for CFAP are only those commodities that are expressly designated as eligible by USDA, it does not appear that poultry are currently eligible for the program.¹³⁷

¹³⁰ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Cattle”); CFAP Handbook, page 6-1, para. 165.C, “Cattle,” page 6-22, para. 177.A (May 22, 2020). Intended use means the end use for which the crop or commodity was grown and produced. CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2); 7 C.F. R. 718.2, “Intended use” (2020). An FSA Fact Sheet also says that the category of All Other Cattle does not include livestock used, or intended for, dairy production. FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020),

¹³¹ CFAP Handbook, page 6-23, para. 177.B (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹³² CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Hogs”); CFAP Handbook, page 6-23, para. 177.B (May 22, 2020).

¹³³ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Pigs”); CFAP Handbook, page 6-23, para. 177.B (May 22, 2020).

¹³⁴ FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What commodities and livestock are eligible?” (May 27, 2020).

¹³⁵ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Lambs and yearlings”); CFAP Handbook, page 6-23, para. 177.B (May 22, 2020).

¹³⁶ USDA, Coronavirus Food Assistance Program FAQ, “What commodities are not eligible for CFAP?” (May 27, 2020).

¹³⁷ As described above, the definition of a “commodity” requires that it be designated by USDA as eligible for payments under CFAP. See CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Commodity”); CFAP Handbook, page 6-22, para. 177.A, and Exhibit 2, page 1, “Commodity” (May 22, 2020).

4. Crops

Eligible crops for CFAP include non-specialty crops and specialty crops. USDA also intends to add some value-loss crops to the list of eligible commodities. The following sections describe in more detail which crops fall into each of these categories.

a. *Non-Specialty Crops*

Non-specialty crops can be eligible commodities for CFAP.¹³⁸ USDA has named the following non-specialty crops as eligible.

- Malting barley. Non-malting barley is not eligible.
- Canola
- Corn
- Upland cotton
- Millet
- Oats
- Sorghum
- Soybeans
- Sunflowers
- Durum wheat
- Hard red spring wheat

Crops intended for grazing are not eligible as non-specialty crops.¹³⁹ So, if a farmer raised one of the above listed crops and intended from the beginning to use these for grazing, and not harvest, that crop is not eligible for CFAP. This probably means that if the farmer intended to harvest the crop, but was forced to use it instead for grazing, the crop is still eligible as a non-specialty crop.

USDA may add more non-specialty crops to this list of eligible crops.¹⁴⁰ The way that can happen is discussed below.

¹³⁸ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Non-specialty crops”); CFAP Handbook, page 2-12, para. 21.A (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What commodities and livestock are eligible?” (May 27, 2020); USDA, Non-Specialty Crops and Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap/non-specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020), at: https://www.farmers.gov/sites/default/files/documents/FSA_CFAP_Non-SpecialtyCropProducers_Fact%20Sheet-2020-5-26-20.pdf.

¹³⁹ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Non-specialty crops”); CFAP Handbook, page 5-2, para. 137.A (May 22, 2020); USDA, Coronavirus Food Assistance Program for Non-Specialty Crop Producers, at: https://www.farmers.gov/sites/default/files/documents/FSA_CFAP_Non-SpecialtyCropProducers_Fact%20Sheet-2020-5-26-20.pdf. Intended use means the end use for which the crop or commodity was grown and produced. See 7 C.F.R. § 718.2, “Intended use” (2020).

¹⁴⁰ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Non-specialty crops”); CFAP Handbook, page 5-21, para. 136.A (May 22, 2020).

b. Specialty Crops

A number of specialty crops can be eligible commodities for CFAP.¹⁴¹ These include fruits, vegetables, nuts, beans, mushrooms, and others, but specialty crops do not include any crops intended for grazing.¹⁴²

More specialty crops may be added.¹⁴³ The way that can happen is discussed below.

The following are the CFAP-eligible specialty crops as of May 27, 2020.¹⁴⁴

Eligible Specialty Crops		
Almonds	Eggplant	Peppers (bell)
Apples	Garlic	Peppers (other)
Artichokes	Grapefruit	Potatoes
Asparagus	Kiwifruit	Raspberries
Avocados	Lemons	Rhubarb
Beans	Lettuce (iceberg)	Spinach
Blueberries	Lettuce (romaine)	Squash
Broccoli	Mushrooms	Strawberries
Cabbage	Onions (dry)	Sweet Potatoes
Cantaloupe	Onions (green)	Tangerines
Carrots	Oranges	Taro
Cauliflower	Papayas	Tomatoes
Celery	Peaches	Walnuts
Corn (sweet)	Pears	Watermelon
Cucumbers	Pecans	

¹⁴¹ FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); USDA, Specialty Crops and the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap/specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crops (May 2020), at: https://www.farmers.gov/sites/default/files/documents/FSA_CFAP_SpecialtyCrops_Fact%20Sheet-2020-5-26-20.pdf.

¹⁴² CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Specialty crops”). Intended use means the end use for which the crop or commodity was grown and produced. See 7 C.F.R. § 718.2, “Intended use” (2020).

¹⁴³ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Specialty crops”); CFAP Handbook, page 8-21, para. 221.A (May 22, 2020).

¹⁴⁴ CFAP Handbook, page 2-12, para. 21.A (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What commodities and livestock are eligible?” (May 27, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Specialty crops”).

c. Value-Loss Crops

USDA appears to believe some value-loss crops will become eligible as commodities for CFAP.¹⁴⁵ According to the CFAP Handbook, value-loss crops are commodities that do not lend themselves to production-based situations.¹⁴⁶

USDA says that the eligibility of specific value-loss crops will be identified in the future.¹⁴⁷ To date, USDA has expressed its intention to add nursery crops (including cut flowers) and aquaculture as eligible value-loss crops.

D. Ineligible Commodities and Adding New Commodities

This section looks at how USDA determined that certain commodities important to many farmers are not eligible for CFAP, and if and how USDA might be convinced to add other commodities to the eligible commodities list in the future.

1. A Partial Listing of Commodities that are Not Eligible

A quick look at the list of eligible commodities, discussed above, shows right away that many agricultural commodities are not eligible for CFAP. As of May 27, 2020, USDA posted a number of commodities on their website that it has concluded are not eligible. This includes some of the most widely raised commodities in the country: (1) sheep more than two years old; (2) eggs/layers; (3) soft red winter wheat; (4) hard red winter wheat; (5) white wheat; (6) rice; (7) flax; (8) rye; (9) peanuts; (10) feed barley; (11) Extra Long Staple (ELS) cotton; (12) alfalfa; (13) forage crops; (14) hemp; and (15) tobacco.¹⁴⁸ It also appears that poultry are not now eligible.¹⁴⁹ There are many others.

2. How USDA Came to Decide which Commodities are Eligible

USDA has the responsibility for deciding what commodities are eligible for CFAP. The only restriction for USDA is that CFAP must meet the requirements found in the federal statutes that are the basis of the program.

¹⁴⁵ See FSA Handbook, page 7-1, para. 200 (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); See also, Coronavirus Food Assistance Program (CFAP) Application, form AD-3114, Part F.

¹⁴⁶ See FSA Handbook, page 7-1, para. 200.A (May 22, 2020). This definition is similar to the definition of value-loss crops that is used in other programs. See, for example, the rules for the Noninsured Crop Disaster Assistance Program (NAP), at 7 C.F.R. § 1437.301 et seq (2020).

¹⁴⁷ FSA Handbook, page 7-1, para. 200.B (May 22, 2020).

¹⁴⁸ FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020); USDA, Coronavirus Food Assistance Program, "Ineligible Commodities and Request for Additional Commodities" (May 26, 2020), at <https://www.farmers.gov/cfap>.

¹⁴⁹ The CFAP Handbook expressly states that any livestock that are not listed as being eligible for CFAP, are not eligible for the program. Poultry, therefore, appear not to be eligible. See FSA Handbook, page 6-22, para. 177.A (May 22, 2020).

a. Authority Under the CARES Act and the CCC Charter Act

As noted in the introduction to this Guide, USDA believes it has the authority under the CARES Act and under the CCC Charter Act to make direct payments to farmers in response to the COVID-19 crisis.¹⁵⁰

USDA believes CARES Act money (about 9.5 billion dollars) can be used to compensate farmers for losses due to price decline and for specialty crops that were shipped and spoiled or went unpaid.¹⁵¹

USDA believes the CCC Charter Act authorizes 6.5 billion dollars to compensate farmers for “losses due to on-going market disruptions.”¹⁵² USDA also says the CCC Act gives USDA authority to make payments that “assist with the transition to a more orderly marketing system as the pandemic wanes.”¹⁵³

USDA’s stated understanding of these statutory authorities suggests that USDA thinks an eligible commodity for CFAP payment would be one that either: (1) has a price decline of 5 percent or greater; or (2) has a marketing disruption due to COVID-19. In practice, however, it is not clear how USDA makes commodity eligibility decisions for CFAP.

b. USDA Eligible Commodity Decisions are Confusing

It is not completely clear how USDA has decided, and will decide, what commodities are eligible for CFAP. Based on what USDA has said about its decisions, there seem to be two conflicting possibilities.

(i) One Possibility—Price Drop or Market Disruption Determine Eligibility

At times, USDA seems to think there are two different things that can make a commodity eligible for CFAP: price drop or market disruption.¹⁵⁴

¹⁵⁰ See generally CARES Act, § 11002, Division B, Title I; Coronavirus Food Assistance Program, 85 Fed. Reg. 30825, 30825, Final Rule (May 21, 2020) (prefatory comments). The CCC Charter Act is found at 15 U.S.C. § 714 et seq.

¹⁵¹ USDA, Coronavirus Food Assistance Program, “Background on CFAP” (May 26, 2020); USDA, Coronavirus Food Assistance Program FAQ, “How will CFAP help agricultural producers impacted by the COVID-19 Pandemic?,” “What commodities are not eligible for CFAP?” (May 27, 2020). More generally, following the CARES Act language, USDA thinks the CARES Act money is to provide assistance to agricultural producers impacted by the effects of COVID-19. USDA, Notice of Funding Availability: Coronavirus Food Assistance Program (CFAP) Additional Commodities Request for Information, 85 Fed. Reg. 31062, 31063 (May 22, 2020). For the CARES Act language, see CARES Act (Division B, Title I).

¹⁵² USDA, Coronavirus Food Assistance Program, “Background on CFAP” (May 26, 2020); see also 15 U.S.C. §§ 714b, 714d, 714e.

¹⁵³ USDA, Coronavirus Food Assistance Program FAQ, “How will CFAP help agricultural producers impacted by the COVID-19 Pandemic?,” “What commodities are not eligible for CFAP?” (May 27, 2020).

¹⁵⁴ USDA, Coronavirus Food Assistance Program FAQ, “What commodities are not eligible for CFAP?” (May 27, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020), at:

On the CFAP website, for example, USDA says eligible commodities must have had either: (1) a “five percent-or-greater price decline;” or (2) “experienced market supply chain disruptions due to COVID-19 and face additional significant marketing costs.”¹⁵⁵ Based on this view, a commodity could be eligible if there was a market disruption, but no decline in price. A commodity could also be eligible if there was a price decline but no market disruption.

In a similar description, the USDA CFAP Rule says that for a commodity to be eligible the farmer must either: (1) have suffered a “five percent-or-greater price loss;” or (2) faced “additional significant marketing costs for inventories—whether caused by lower prices given significant declines in certain types of demand, surplus, production, or disruptions to shipping patterns and the orderly marketing of commodities.”¹⁵⁶ The CFAP Rule notes that due to COVID-19 many farmers markets, restaurants, and schools have closed, thus causing significant decreased demand for commodities that are normally supplied to those places.

(ii) A Second Possibility—Only Price Drop Determines Eligibility

At other times, USDA seems to think that price declines are what makes a commodity eligible for CFAP, and that market disruptions do not matter.

For example, USDA says that commodities listed as eligible in the Federal Register “were determined by USDA to have incurred price decline of at least five percent . . .”¹⁵⁷ USDA adds that agricultural commodities not listed in the Federal Register, but which have widely published price data, are not included because they have been determined to have a “minimal price impact” from COVID-19.¹⁵⁸

In multiple places on the CFAP website, USDA has also said flatly that commodities that did not suffer a five percent-or-greater price decline

https://www.farmers.gov/sites/default/files/documents/FSA_CFAP_AdditionalCommodities_Fact%20Sheet-2020-5-27-20.pdf.

¹⁵⁵ USDA, Coronavirus Food Assistance Program, “About the Coronavirus Food Assistance Program” (May 26, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What commodities and livestock are eligible?” (May 27, 2020). Disruptions to supply chains can also include situations in which a commodity did not leave the farm or remained unharvested due to a loss of marketing channels. See FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020).

¹⁵⁶ NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

¹⁵⁷ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020). In order to be eligible, the price decline must have occurred over a certain time period, and that period varies with crops. For non-specialty crops, they are defined above, the loss in price needed to have taken place between the week of January 13-17, 2020 and April 6-9, 2020. For all other commodities, the loss in price needed to have taken place between the week of January 13-17, 2020, and April 6-10, 2020.

¹⁵⁸ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

from mid-January to mid-April 2020 are not eligible for CFAP.¹⁵⁹ For example, in response to a frequently asked question of why, when a farm was affected by COVID-19, the commodity the farmer produced is not eligible, USDA states that the “commodities currently included in the program are those for which USDA data was available to determine that a five percent-or-greater price decline occurred from mid-January 2020 to mid-April 2020.”¹⁶⁰

(iii) The Rationale for Making Eligibility Determinations is Important

The question of how USDA decides if a commodity is eligible under CFAP is important. Certainly, if a five percent reduction in price is required for a commodity, many losses directly traceable to COVID-19 will not result in CFAP eligibility.

Further, USDA has declined to list many commodities as eligible, but has said officially that it intends to add some commodities if people provide information about their losses.¹⁶¹ It would be helpful to know for certain if the only way a commodity could become eligible for CFAP is if there was a five percent-or-greater decline in price.

3. Three Categories of Commodities are Not Now Eligible for CFAP

There are at least three categories of commodities that are not now eligible for CFAP: (1) commodities for which USDA does not have enough data to make them eligible; (2) commodities that USDA intends to make eligible, but for which USDA needs more data; and (3) commodities that USDA has decided are not eligible, despite sufficient data.

a. USDA Does Not Have Enough Data to Declare Eligible

For many commodities, USDA says it does not have enough data to decide if the commodity is eligible for CFAP. USDA says that it only included commodities as being eligible when there was data available that showed there was a five-percent-or-greater price decline for the commodity from mid-January 2020 to mid-April 2020.¹⁶²

¹⁵⁹ USDA, Coronavirus Food Assistance Program, “Ineligible Commodities and Request for Additional Commodities” (May 26, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What Commodities are Not Eligible for CFAP?” (May 27, 2020).

¹⁶⁰ USDA, Coronavirus Food Assistance Program FAQ, “COVID-19 has had a significant negative impact on my farm business. Why isn’t the commodity I produced include in the program?” (May 27, 2020).

¹⁶¹ NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); USDA, Coronavirus Food Assistance Program FAQ, “COVID-19 has had a significant negative impact on my farm business. Why isn’t the commodity I produced include in the program?” (May 27, 2020).

¹⁶² FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020); USDA, Coronavirus Food Assistance Program FAQ, “COVID-19 has had a significant negative impact on my farm business. Why isn’t the commodity I produced include in the program?” (May 27, 2020).

USDA has published what is called a Notice of Funding Availability (NOFA), an announcement designed to request additional information about commodities that could be added to the eligible commodity list in the future.¹⁶³ In the NOFA, On its website, USDA is also requesting data from the public on commodities that are not already eligible for CFAP and that “may have been negatively impacted by the COVID-19 pandemic and for which insufficient information is not available to USDA.”¹⁶⁴

b. USDA Plans to Make Eligible but Needs More Data—Nursery Products and Aquaculture

For some significant commodities, there is currently no official eligibility for CFAP, but USDA says it intends to make them eligible after more data about the crops is collected.¹⁶⁵ Nursery products (including cut flowers) and aquaculture products fall into this category.¹⁶⁶

c. USDA Has Data and Thinks Commodity is not Eligible

For a number of commodities, USDA thinks it has enough data to decide that the commodity is not eligible for CFAP. USDA says, for example, if a commodity is not listed as eligible, but there is widely published price data available (such as prices collected by USDA and data from commodities traded on the futures markets), that USDA has already determined that COVID-19 has had a “minimal” price impact and the commodity is therefore not eligible.¹⁶⁷

It is possible, with more data from people who send comments to USDA, that USDA would change its mind about some of these commodities and make them eligible. USDA says specifically that it may “reconsider” the excluded commodities if “credible evidence” is provided that supports a five percent decline in price.¹⁶⁸

¹⁶³ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020). This NOFA says that it is not requesting data on commodities that have already been excluded from CFAP. It is not clear, however, how one would know the difference between a commodity that has already been excluded and one for which USDA thinks it needs additional information. Moreover, on the USDA website USDA says that it “may reconsider the excluded commodities if credible evidence is providing that supports a five percent price decline.” See USDA, Coronavirus Food Assistance Program, “About the Coronavirus Food Assistance Program” (May 26, 2020).

¹⁶⁴ USDA, Coronavirus Food Assistance Program FAQ, “COVID-19 has had a significant negative impact on my farm business. Why isn’t the commodity I produced include in the program?” (May 27, 2020).

¹⁶⁵ NOFA, 85 Fed. Reg. 31062, 31063-31064 (May 22, 2020).

¹⁶⁶ NOFA, 85 Fed. Reg. 31062, 31063-31064 (May 22, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); USDA, Coronavirus Food Assistance Program, Ineligible Commodities and Request for Additional Commodities (May 26, 2020). Nursery products and aquaculture are sometimes referred to as value-loss crops. See FSA Notice CFAP-4, pages 9, 14, paras. 4.A, 5.D (May 20, 2020).

¹⁶⁷ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

¹⁶⁸ USDA, Coronavirus Food Assistance Program FAQ, “What commodities are not Eligible for CFAP?” (May 27, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020).

4. USDA Might Make Other Commodities Eligible and Wants More Information from Farmers

USDA has asked for information from the public to be used to determine whether additional agricultural commodities not currently listed should be made eligible for CFAP. USDA made this request both on its website,¹⁶⁹ as well as through a Notice of Funding Availability (NOFA), which was published in the Federal Register on May 22, 2020.¹⁷⁰ USDA says it may use the information and comments provided to determine whether additional commodities should become eligible for CFAP.¹⁷¹

The following sections describe the process for providing information to USDA in response to its request for information.

a. Level of Detail to Provide in Comments

USDA is looking for very particular information when people comment on the list of eligible CFAP commodities.¹⁷² Noting that the commodity is widely raised will not affect USDA's decision. Neither will accounts that simply describe losses for commodities that were affected by COVID-19 but not included on USDA's list of eligible commodities. Instead, USDA says the most helpful information—which means the information most likely to convince USDA to change its mind about the eligibility of a commodity—will describe how the commodity's price decline was determined, and the documentation of the sources used to conclude that the price went down by at least five percent.¹⁷³ This documentation could include information on futures prices, sales trends, market trends, or food price indexes.¹⁷⁴

More specifically, USDA is looking for information on specialty crops that have experienced a 5-percent-or-greater price loss between the weeks of January 13-17, 2020 and April 6-10, 2020.¹⁷⁵ For all other commodities, USDA wants information on 5-percent-or-greater price losses for the week of April 6-10, 2020 only. On the CFAP website, however, USDA says that it wants information on commodities that have experienced both a five-percent-or-greater price loss and which face additional marketing costs due to COVID-19.¹⁷⁶ As described above, it is not clear if both the price loss and increased marketing costs must be true in order for USDA to add a commodity to the list of CFAP-eligible commodities.¹⁷⁷

¹⁶⁹ USDA, Coronavirus Food Assistance Program FAQ, "COVID-19 has had a significant negative impact on my farm business. Why isn't the commodity I produced include in the program?" (May 27, 2020).

¹⁷⁰ NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

¹⁷¹ NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

¹⁷² See generally NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

¹⁷³ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

¹⁷⁴ FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020).

¹⁷⁵ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

¹⁷⁶ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020); USDA, Coronavirus Food Assistance Program, "Ineligible Commodities and Request for Additional Commodities" (May 26, 2020).

¹⁷⁷ USDA has stated that it will "reconsider" excluded commodities "if credible evidence is provided that supports a five percent price decline." See USDA, Coronavirus Food Assistance Program, "Ineligible Commodities and Request for Additional Commodities" (May 26, 2020). On an FSA Fact Sheet, USDA suggests it will consider adding other eligible commodities if they have suffered the required

USDA suggests that anyone providing comments consider three questions.¹⁷⁸ First, what commodities that are not currently on the eligible commodity list have suffered a 5-percent-or-greater price loss between January and April 2020 and face additional marketing costs due to COVID-19? Second, what is the price per unit of measure that a farmer received for commodities sold during the week of January 13, 2020 through January 17, 2020, as well as the basis for that price determination?¹⁷⁹ Third, what is the price per unit of measure that a farmer received for commodities sold between April 6, 2020 and April 10, 2020, as well as the basis for that price determination?¹⁸⁰

Based on the information on USDA's website, as well as the request for comments in the NOFA, it appears that, at minimum, any comments should provide details on price decline, and—if available—information on additional marketing costs.

b. Type of Commodities USDA is Seeking Information On

USDA is seeking information on commodities that may have been negatively impacted by COVID-19, but for which USDA does not currently have sufficient information.¹⁸¹

Although farmers can submit information on any commodity, USDA says it is especially interested in information on nursery products (including cut flowers) and aquaculture products.¹⁸² As summarized in the following sections, USDA's recent notice of funding availability (NOFA) provides a more detailed description of the information USDA is seeking on nursery products and aquaculture.

price decline *or* if there has been a loss of marketing channels. See FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020).

¹⁷⁸ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020). USDA notes that the questions “are not intended to limit the type or amount of information provided.”

¹⁷⁹ USDA says that if information on that specific date range is not available, farmers can provide information from the nearest dates. See NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

¹⁸⁰ USDA says that if information on that specific date range is not available, farmers can provide information from the nearest dates. See NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

¹⁸¹ NOFA, 85 Fed. Reg. 31062, 31062-31063 (May 22, 2020). USDA says it is not interested in comments that provide information about commodities that are already eligible for CFAP. So, for example, USDA is not interested in comments that argue that the payment rate for a certain commodity should be higher. It only wants to hear about commodities that have no payment rate and that are not include as being eligible at all.

¹⁸² NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020).

(i) Nursery Products

As of May 27, 2020, nursery products are not eligible for CFAP. USDA says it is especially interested in price decline information about nursery products, which include cut flowers.¹⁸³

USDA sets out a number of questions about nursery products that it would like to see addressed. For nurseries that sell multiple products, such as trees, shrubs, or perennial plants, USDA is asking that separate information be provided for each nursery product.

First, USDA would like information on the live trees, shrubs, and other plants that a farmer produced, had a vested ownership interest in, and which were held in inventory at any point between January 15, 2020 and April 15, 2020.¹⁸⁴ USDA would like to know three things about these nursery products. First, what was the average price received per plant sold the week of January 13, 2020 through January 17, 2020?¹⁸⁵ This should be by type of product sold—for example, roses, boxwood, junipers. Second, what was the average price received per plant sold in the week of April 6, 2020 through April 10, 2020?¹⁸⁶ Finally, how many plants did the farmer sell between January 15, 2020 and April 15, 2020?¹⁸⁷

USDA is also interested in two other types of information from nurseries.¹⁸⁸ First, USDA would like to know the number and contracted price of plants that were produced and left the nursery by April 15, 2020, but which later died or withered due to there being no market. USDA is only interested in this information if the nursery did not have federal crop insurance or Noninsured Crop Assistance Program (NAP) benefits to cover the loss. Second, USDA would like to know the number of plants for sale that did not leave the nursery by April 15, 2020, and which will not be sold due to lack of markets.

(ii) Aquaculture

USDA believes that at least some aquaculture production should be eligible for CFAP.¹⁸⁹ An eligible aquaculture producer for CFAP would mean a privately-owned aquaculture business that propagates freshwater and saltwater products in controlled environments.¹⁹⁰

¹⁸³ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

¹⁸⁴ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

¹⁸⁵ A date close to this period can also be used. See NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

¹⁸⁶ A date close to this period can also be used. See NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

¹⁸⁷ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

¹⁸⁸ NOFA, 85 Fed. Reg. 31062, 31063-31064 (May 22, 2020).

¹⁸⁹ NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020); see also CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(j)(2)).

¹⁹⁰ NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(j)(2)). Controlled environment can mean raceways, ponds, tanks, and recirculating systems. USDA says that farmed shrimp, as well as trout and salmon (salmonids), will be included in CFAP if it can be shown that specific types have suffered the required 5-percent-or-greater price decline.

USDA is interested in gathering several pieces of information in order to determine whether there has been a sufficient decline in price for certain aquaculture products.¹⁹¹ In providing this information, answers should be separate based on individual aquaculture products.

For live aquaculture that a farmer produced, had a vested ownership interest in, and which was held in inventory at any point between January 15, 2020 and April 15, 2020, USDA would like to know three things.¹⁹² First, what is the average price received per product for the week of January 15, 2020 through January 17, 2020?¹⁹³ Second, what was the average price received per product sold the week of April 6, 2020 through April 10, 2020?¹⁹⁴ Third, what was the number of aquaculture products sold between January 15, 2020 and April 15, 2020?

USDA would also like to know the number and contracted price of aquaculture products that were produced and left the farm by April 15, 2020, but which were later spoiled because there was no market for the products.¹⁹⁵ USDA is only interested in this information if the nursery did not have federal crop insurance or Noninsured Crop Assistance Program (NAP) benefits to cover the loss.

Finally, USDA would like to know the inventory of aquaculture products as of April 15, 2020 that will not be sold due to a lack of markets.¹⁹⁶

c. How to Submit Comments

Comments may be sent to USDA in one of two ways.¹⁹⁷ First, they may be sent through what is called the Federal Rulemaking Portal. According to USDA, those wishing to comment using this portal should go online to [regulations.gov](https://www.regulations.gov) and search for Dock ID-FSA-2020-004.

Second, comments can also be sent by mail to:

Director, SNC, FSA, USDA
1400 Independence Avenue SW
Stop 0522
Washington, DC 20250

¹⁹¹ NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

¹⁹² NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

¹⁹³ A date close to this period can also be used. See NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

¹⁹⁴ A date close to this period can also be used. See NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

¹⁹⁵ NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

¹⁹⁶ NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

¹⁹⁷ NOFA, 85 Fed. Reg. 31062, 31065 (May 22, 2020); USDA, Coronavirus Food Assistance Program, "Ineligible Commodities and Request for Additional Commodities" (May 26, 2020).

d. Deadline to Submit Comments—June 22, 2020

The deadline to submit comments to USDA on additional commodities is June 22, 2020.¹⁹⁸

VI. CFAP Sign-Up Process and Application

To apply for a CFAP payment, a farmer must submit a completed application, as well as certain forms and supporting documentation. The sections below outline these requirements.

C. CFAP Application and Payment Calculator

The Coronavirus Food Assistance (CFAP) Application is form AD-3114 and can be downloaded from USDA's website.¹⁹⁹

The USDA website also provides what it is calling a CFAP Payment Calculator.²⁰⁰ The Payment Calculator is a worksheet that allows farmers to input the required information about the farm's production, and that information is then automatically transferred into the CFAP application, form AD-3114, which the farmer can then print and sign.

D. Apply Through Local FSA Office—Must Call for Appointment

According to USDA, farmers should apply for CFAP through their local FSA office—sometimes called an FSA Service Center.²⁰¹ FSA offices are currently available for phone appointments only, and farmers are advised to call their office to schedule an appointment.²⁰²

The CFAP application can be submitted in-person (when available), by mail, email, or fax.²⁰³ Other authorized methods may also be allowed.²⁰⁴ USDA is requesting that farmers call their local FSA office before submitting a CFAP application, even if the application is being submitted electronically.²⁰⁵

¹⁹⁸ NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

¹⁹⁹ The CFAP application, form AD-3114, is available at: <https://www.farmers.gov/cfap>. An example of form AD-3114 can be found at FSA Notice CFAP-4, Exhibit 1 (May 20, 2020). If a farmer needs more space to complete the application, the USDA website provides a link to a continuation form, called AD-3114A.

²⁰⁰ See USDA, Coronavirus Food Assistance Program, CFAP Application, at: <https://www.farmers.gov/cfap>.

²⁰¹ See FSA Notice CFAP-4, page 3, para. 2.A (May 20, 2020); see also USDA, Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap>. The regulations, however, state that CFAP applications may be submitted to "any FSA county office." See CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(a)).

²⁰² For information on contacting and locating FSA Service Centers, see: <https://www.farmers.gov/coronavirus>.

²⁰³ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(a)); CFAP Handbook, page 3-1, para. 50.A (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.B (May 20, 2020).

²⁰⁴ CFAP Handbook, page 3-1, para. 50.A (May 22, 2020); FSA Notice CFAP-4, page 4, para. 2.B (May 20, 2020). According to the CFAP Handbook, any additional methods for submitting applications will be posted on www.farmers.gov.

²⁰⁵ See USDA, Coronavirus Food Assistance Program, How to Apply, at: <https://www.farmers.gov/cfap>.

E. Application Period—May 26, 2020 Until August 28, 2020

USDA began accepting CFAP applications on May 26, 2020.²⁰⁶ The application period for CFAP ends at close of business on August 28, 2020.²⁰⁷ Any application submitted or postmarked after August 28, 2020 will not be approved for CFAP.²⁰⁸ The application period could end earlier if funds are exhausted before August 28, 2020.²⁰⁹

VII. Required Forms, Certification, and Documentation

When applying for a CFAP payment, farmers will need to fill out a number of forms, will need to certify information on the application, and will need to save documentation used to fill out the application form.

A. Required Eligibility Forms

There are several forms that farmers must submit in order to be eligible for CFAP. Each of these forms must be submitted within sixty days from the date on which the farmer signs the CFAP application.²¹⁰ If they are not submitted within this timeframe, the farmer may receive a reduced payment or no payment at all.²¹¹

For some farmers who have worked with FSA in the past, many of these forms may be on file with FSA already. For other farmers, these forms may be completely new. USDA has established a CFAP Call Center for any farmers who would like additional one-on-one support with their CFAP application.²¹²

The following are the forms a farmer must submit in order to receive a CFAP payment.

²⁰⁶ CFAP Handbook, page 2-13, para. 21.B (May 22, 2020); FSA Notice CFAP-4, page 3, para. 2.A (May 20, 2020).

²⁰⁷ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(a)); CFAP Handbook, page 2-13, para. 21.B (May 22, 2020); FSA Notice CFAP-4, page 3, para. 2.A (May 20, 2020).

²⁰⁸ CFAP Handbook, page 2-13, para. 21.B, and page 3-8, para. 51.E (May 22, 2020).

²⁰⁹ CFAP Rule, 85 Fed. Reg. 30825, 30835 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(h)).

²¹⁰ CFAP Rule, 85 Fed. Reg. 30825, 3027, 30831 (May 21, 2020) (prefatory comments and to be codified at 7 C.F.R. § 9.4(b)); CFAP Handbook, page 3-2, para. 50.B (May 22, 2020); FSA Notice CFAP-4, page 8, para. 3.G (May 20, 2020).

²¹¹ CFAP Rule, 85 Fed. Reg. 30825, 30827 (prefatory comments), 30831 (to be codified at 7 C.F.R. § 9.4(b)); FSA Notice CFAP-4, page 8, para. 3.F-G (May 20, 2020); FSA Notice CFAP-4, page 8, para. 3.F-G (May 20, 2020).

²¹² USDA says that any farmer who wishes to speak with a USDA employee and get assistance with the CFAP application should call 1-877-508-8364. See USDA, Coronavirus Food Assistance Program, How to Apply, at: <https://www.farmers.gov/cfap>.

1. Farm Operating Plan (Form CCC-902)

A farm operating plan must be submitted.²¹³ This is known as form CCC-902.²¹⁴ Some farmers will already have this form on file with FSA.

According to the CFAP Application, only parts A and B of form CCC-902 are required.²¹⁵ The farm operating plan collects contact information for the applicant, as well as information on the applicant's citizenship status, contributions of foreign persons (if applicable), and member information if the applicant is an entity.²¹⁶ The USDA website expressly says that USDA staff will help applicants complete the required portions of form CCC-902.²¹⁷

2. Member Information Form—Legal Entities Only (Form CCC-901)

If a legal entity is applying for a CFAP payment, a member information form must be submitted.²¹⁸ This form, known as CCC-901, collects contact information on members, including citizenship status, as well as Tax Identification Numbers.²¹⁹

3. Average Adjusted Gross Income Statement (Form CCC-941)

Farmers must submit a form certifying their average adjusted gross income (AGI) and consent to tax disclosure.²²⁰ This form is known as CCC-941.²²¹

4. Certificate of Income from Farming, Ranching, Forestry (Form CCC-942)—If Applicable

If a farmer exceeds the adjusted average gross income (AGI) limitations for CFAP, the farmer should submit a certificate of income form.²²² This is known as form CCC-942.²²³

²¹³ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(1)); CFAP Handbook, page 2-10, para. 19.A, and page 2-57, para. 37.A (May 22, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020). The Notice states that the farm operating plan must be completed according to FSA Handbook, 5-PL (Amendment 6), Payment Eligibility, Payment Limitation, and Average Adjusted Gross Income—Agricultural Act of 2014 (October 2, 2019) and FSA Handbook, 3-PL (Revision 2), Web-Based Subsidiary Files (June 16, 2009).

²¹⁴ One example of a Form CCC-902 can be downloaded at: https://www.fsa.usda.gov/programs-and-services/payment-eligibility/actively_engaged/index.

²¹⁵ See CFAP Application, Form CCC-902, Part A.

²¹⁶ FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020).

²¹⁷ See USDA, Coronavirus Food Assistance Program, CFAP Application, at: <https://www.farmers.gov/cfap>.

²¹⁸ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(2)).

²¹⁹ Form CCC-901 is available in English and Spanish, at: <https://www.farmers.gov/cfap>.

²²⁰ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(3)); CFAP Handbook, page 2-57, para. 37.A (May 22, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020).

²²¹ Form CCC-941 is available in English and Spanish, at: <https://www.farmers.gov/cfap>.

²²² CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(4)); CFAP Handbook, page 2-57, para. 37.A (May 22, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020).

²²³ A downloadable copy of form CCC-942, with instructions, is available at: <https://www.farmers.gov/cfap>.

5. Highly Erodible Land and Wetland Conservation Certification (Form AD-1026)

Farmers must certify compliance with certain highly erodible land and wetland conservation rules.²²⁴ Farmers can do this by either self-certifying compliance or by submitting form AD-1026.²²⁵

B. Additional Supporting Documentation

USDA may ask the farmer for more records to verify the information given on the CFAP application.²²⁶

1. Farmer Self-Certification

The CFAP application largely involves farmer self-certification of information about the farming operation. Information that is essential for establishing the CFAP payments—on production of crops and livestock, sales of commodities, and inventory at various times—is all self-certified by the farmer. USDA expects that farmers providing this information will need sales, inventory, and other records to complete the application.²²⁷ This documentation will not need to be submitted with the application. Instead, the farmer self-certifies that the information is true, but the farmer must still keep the documentation they used when filling out the application.²²⁸

Two additional points should be made about farmer self-certification for CFAP.

First, when signing the CFAP application, farmers are saying, under penalty of perjury, that the information they are providing on the application form is true and correct.²²⁹ A farmer that intentionally represents as true information that the farmer knows or believes is not true is possibly subject to criminal and civil fraud statutes.²³⁰

Second, USDA says it will use spot checks of farmers' applications.²³¹ In the spot checks, USDA will ask for documentation that was used for the CFAP application.²³² USDA

²²⁴ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)); CFAP Handbook, page 2-8, para. 18.A (May 22, 2020). Form AD-1026 is available in English and Spanish, at: <https://www.farmers.gov/cfap>.

²²⁵ Form AD-1026 is available in English and Spanish, at: <https://www.farmers.gov/cfap>.

²²⁶ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments).

²²⁷ USDA, Coronavirus Food Assistance Program FAQ, "What documents do I need to submit with my application?" (May 27, 2020).

²²⁸ Farmers applying for CFAP are required to keep the documents used to support the application for three years after the approval date of the application. CFAP Handbook, page 1-11, para. 3.G (May 22, 2020).

²²⁹ See Coronavirus Food Assistance Program (CFAP) Application, Form AD-3114, Part I, at: https://www.farmers.gov/sites/default/files/documents/AD3114_200519V01%20%20FINAL.pdf; CFAP Handbook, page 1-12, para. 4.B (May 22, 2020); USDA, Coronavirus Food Assistance Program FAQ, "What documents do I need to submit with my application?" (May 27, 2020).

²³⁰ CFAP Handbook, page 1-12, para. 4.B (May 22, 2020); USDA, Coronavirus Food Assistance Program FAQ, "What documents do I need to submit with my application?" (May 27, 2020).

²³¹ CFAP Handbook, page 3-5, para. 51.B (May 22, 2020).

²³² CFAP Handbook, page 3-5, para. 51.B (May 22, 2020); USDA, Coronavirus Food Assistance Program FAQ, "What documents do I need to submit with my application?" (May 27, 2020).

expects farmers to keep documents that were used for the application.²³³ If the farmer provided inaccurate information on the CFAP application, the farmer may need to refund some of the payment.²³⁴ In some cases, for example, if a farmer misrepresented the total amount of the farmer's share of the crop, the head of livestock, or production, the application may be disapproved and the farmer may need to refund the money with interest.

2. USDA May Ask for Additional Information

In some cases, USDA will request that a farmer provide additional supporting documentation.²³⁵ When a farmer signs the CFAP application, the farmer is agreeing to give USDA "all information that is necessary to verify that the information on the form is accurate."²³⁶ The farmer also agrees to allow USDA to see all documents and records of the producer. This includes records that are in the possession of a third party, such as a warehouse, processor, or packer.

The following are the types of additional information that USDA may request from farmers.

a. Information on Farmer's Intent to Harvest, Transport or Market

If asked by USDA, a farmer must provide documentation to demonstrate that the farmer has the ability and intent to harvest, transport, and market the commodity for its intended market or for its expected production.²³⁷ Similarly, a farmer may be required to provide documentation to verify the crop's expected production in a quantity based upon the farmer's approved yield, expected level or production, or inventory of the livestock, crop, or commodity.

b. Information Showing Farmer's Ownership in Commodity

If requested by USDA, a farmer must provide documentation to show the farmer's ownership share in an eligible commodity.²³⁸

c. Information Establishing Farmer's Risk in the Commodity

If requested by USDA, a farmer must provide documentation to show the farmer's value that is at risk in an eligible commodity.²³⁹

²³³ For examples of supporting documentation that farmers may need, see CFAP Handbook, pages 3-5 and 3-6, para. 51.B (May 22, 2020).

²³⁴ 85 Fed. Reg. 30825, 30828 (May 21, 2020) (prefatory comments); CFAP Handbook, page 1-12, para. 4.A (May 22, 2020).

²³⁵ CFAP Application, Form AD-3114, Part A; CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)); CFAP Handbook, page 1-12, para. 4.A (May 22, 2020).

²³⁶ CFAP Application, Form AD-3114, Part A; CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)); CFAP Handbook, page 3-2, para. 50.B (May 22, 2020).

²³⁷ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(1)).

²³⁸ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(2)).

²³⁹ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(3)).

d. Information to Verify Amounts Listed on Application

If requested by USDA, a farmer must provide documentation that substantiates the amounts listed on the farmer's CFAP application.²⁴⁰ For example, the production for various commodities, including non-specialty crops, dairy, and specialty crops, must be based on production records. Similarly, a farmer's inventory, which includes livestock, non-specialty crops, and wool, must be based on inventory records.

Examples of supporting documentation that USDA has in mind to substantiate inventory and production include the following: (1) copies of receipts; (2) ledgers of income; (3) income statements; (4) deposit slips; (5) veterinarian records; (6) register tapes; (7) invoices for custom harvesting; (8) records to verify production costs; (9) contemporaneous measurements; (10) truck scale tickets, (11) contemporaneous diaries that USDA decides are acceptable; and (12) milk marketing statements for January through March 2020.²⁴¹

C. Additional Required and Optional Forms

The following forms may also be needed in order to complete the CFAP application.

1. Customer Contact Information (Form AD-2047)

USDA may require that farmers submit form AD-2047, which provides basic customer contact information.²⁴²

2. Payment Eligibility and Payment Limitation (Form CCC-903)

A farmer may also need to submit a worksheet that provides information to help USDA determine if the farmer meets the CFAP requirements for producer, payment limitations, and foreign person eligibility.²⁴³ This is known as form CCC-903.

3. Banking and Direct Deposit Information Form (Form SF-3881)—Optional

If farmers wish to receive a CFAP payment by direct deposit, they should complete form SF-3881, which provides the needed banking and direct deposit information.²⁴⁴

4. Socially Disadvantaged, Limited Resource, Beginning, and Veteran Farmer or Rancher Certification (Form CCC-860)—Optional

Farmers who want to inform USDA that they fall within the category of a socially disadvantaged, limited resource, beginning, or veteran farmer or rancher, may submit

²⁴⁰ CFAP Rule, 85 Fed. Reg. 30825, 30827 (prefatory comments) (May 21, 2020).

²⁴¹ CFAP Rule, 85 Fed. Reg. 30825, 30827-30828 (prefatory comments) (May 21, 2020); CFAP Handbook, pages 3-5 and 3-6, para. 51.B (May 22, 2020).

²⁴² Form AD-2047 is available at: <https://www.farmers.gov/cfap>.

²⁴³ CFAP Handbook, page 2-10, para. 19.A (May 22, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020).

²⁴⁴ Form SF-3881 is available at: <https://www.farmers.gov/cfap>.

a certification to that effect using form CCC-860.²⁴⁵ This certification is completely optional.²⁴⁶ The information on form CCC-860 does not affect CFAP eligibility or impact a farmer's potential CFAP payment in any way.

D. Keep Documents for Three Years

Farmers who are approved for a CFAP payment must keep the documentation used in support of their application for three years after the date of approval.²⁴⁷

E. Farm Numbers

As it stands right now, USDA is not requiring farmers to establish a farm number with FSA in order to apply for CFAP. For many other USDA programs, a farm number is required. In general, a farm number is a number that can be assigned by FSA when the land is part of a single farming operation, although it is possible for land with different owners to be combined into a single farm.²⁴⁸

VIII. CFAP Payments

CFAP direct farmer payments are calculated based on the type of eligible commodity. The following sections describe the rules and methods for calculating CFAP payments.

A. Made in Two Disbursements

In general, payments for the CFAP are made in two disbursements.²⁴⁹ An initial payment will account for 80 percent of the farmer's maximum eligible CFAP payment.²⁵⁰ If funds remain available, FSA may issue a second payment—up to the total amount of the farmer's remaining eligible payment—but it is not required to do so.²⁵¹ In order to remain within the sixteen billion dollar budget for the CFAP direct payments program, FSA may prorate

²⁴⁵ Form CCC-860 is available at:

https://forms.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/CCC0860_140402V01.pdf.

²⁴⁶ FSA Notice CFAP-4, page 18, para. 6.B (May 20, 2020).

²⁴⁷ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.6(a)); CFAP Handbook, page 1-11, para. 3.G (May 22, 2020).

²⁴⁸ For a short discussion, see FSA, What is the Definition of a Farm Number and a Farm? at:

https://askfsa.custhelp.com/app/answers/detail/a_id/1870/~/_what-is-the-definition-of%3A-a-farm-number-and-a-farm%3F. For the official rules for creating or changing a farm number, see FSA Handbook, 10-CM, Farm Records and Reconstitutions for 2013 and Subsequent Years (September 11, 2019), at https://www.fsa.usda.gov/Internet/FSA_File/10-cm_roo_a05.pdf

²⁴⁹ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(k)); CFAP Handbook, page 2-14, para. 22.A (May 22, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "The impacts of COVID-19 on agriculture producers are significant. What if you run out of funding?" (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

²⁵⁰ The CFAP Notice states that it is possible for farmers to receive subsequent payments as more data is received from the farmer. The Notice does not explain what "more data" means. See FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

²⁵¹ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(k)); CFAP Handbook, page 2-14, para. 22.A (May 22, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

the second payment.²⁵² FSA does not state when the second disbursement may be made, only that it will be made “at a later date” if funds remain available.²⁵³

B. Payment Rates Set By USDA

CFAP payments are calculated, in part, using payment rates that USDA has set for each eligible commodity.²⁵⁴ USDA provides an explanation for how it decided upon these rates.²⁵⁵

C. Funded with CARES Act and CCC Money

One especially confusing aspect of the payment calculations relates to the fact that the CFAP Direct Payments Program is funded through both the CARES Act and the CCC. According to USDA, in order to ensure that CFAP is properly using its funding from both sources, USDA is tracking the parts of each CFAP payment that come from the CARES Act and the CCC.²⁵⁶ To do this, USDA has created different payment calculation formulas for the part of a commodity's payment that comes from the CARES Act and the part that is funded by the CCC. In some cases, the funding from the CARES Act is used to pay for different types of losses than the funding from the CCC. If a farmer is eligible for a commodity loss from both funding sources (the CARES Act and the CCC), the payments from each funding source will be added together to get one total payment for that commodity.²⁵⁷

D. Payment Calculations

CFAP payments are calculated by eligible commodity.²⁵⁸ FSA uses a different calculation for commodities that fall into each the following categories: (1) non-specialty crops; (2) specialty crops; (3) livestock, including cattle, hogs, pigs, lambs and yearlings; (4) dairy;

²⁵² CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments). According to FSA, making the CFAP payments in two disbursements allows FSA to quickly assist farmers, while also ensuring that there is enough funding for the program throughout the entire application period, which runs from May 26, 2020 through August 28, 2020. 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); FSA Fact Sheet, Coronavirus Food Assistance Program (May 2020), at: https://www.farmers.gov/sites/default/files/documents/FSA_CFAP_General_Fact%20Sheet-2020-5-26-20.pdf; USDA, Coronavirus Food Assistance Program FAQ, “The impacts of COVID-19 on agriculture producers are significant. What if you run out of funding?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>

²⁵³ FSA Fact Sheet, Coronavirus Food Assistance Program (May 2020); USDA, Coronavirus Food Assistance Program, CFAP Payment Limitations and Structure, at: <https://www.farmers.gov/cfap>.

²⁵⁴ See CFAP Rule, 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(h)); CFAP Handbook, pages 2-17 through 2-19, para. 22.B (May 22, 2020). The payment rates are also available on USDA's website. See, for example, USDA, Specialty Crops and the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap/specialty>.

²⁵⁵ See CFAP Rule, 85 Fed. Reg. 30825, 30826, (May 21, 2020) (prefatory comments); see also USDA, Coronavirus Food Assistance Program FAQ, “How were payment rates determined?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.”

²⁵⁶ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments).

²⁵⁷ CFAP Rule, 85 Fed. Reg. 30825, 30826, 30827 (May 21, 2020) (prefatory comments).

²⁵⁸ CFAP Rule, 85 Fed. Reg. 30825, 30832-30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “How are payments determined?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

and (5) wool.²⁵⁹ It appears that USDA also intends to provide payments for certain value-loss crops, such as aquaculture and nursery products, but USDA has yet to determine how those payments will be calculated.²⁶⁰

The CFAP payment calculations for each commodity category are described in the following sections.

1. Calculating Non-Specialty Crop Payments

In general, payments for eligible non-specialty crops are based on a farmer's unpriced inventory that was harvested and held as of January 15, 2020. As described earlier, unpriced inventory means any production that is not subject to an agreed-upon price in the future, either through a forward contract, agreement, or similar binding document.²⁶¹ Sometimes FSA refers to unpriced inventory as being inventory that is subject to price risk.²⁶²

a. CARES Act Funding Formula

The following steps are taken to determine the part of non-specialty crop payments that come from CARES Act funding.²⁶³

Step One: Determine the farmer's eligible inventory for the commodity. This is the lesser of: (1) the farmer's self-certified unpriced inventory that the farmer had a vested ownership in as of January 15, 2020; or (2) 50 percent of the farmer's 2019 production of that commodity.²⁶⁴

Step Two: Multiply the result of Step One by 50 percent.

²⁵⁹ CFAP Rule, 85 Fed. Reg. 30825, 30832-30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5); CFAP Handbook, pages 2-15 and 2-16, para. 22.A (May 22, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

²⁶⁰ CFAP Handbook, page 2-15, para. 22.A (May 22, 2020). The CFAP Payment Calculator worksheet also has a section for value-loss crops. See USDA, Coronavirus Food Assistance Program, CFAP Payment Calculator, at: <https://www.farmers.gov/cfap#apply>.

²⁶¹ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Unpriced inventory"); CFAP Handbook, page 2-16, para. 22.A (May 22, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020). For examples of forward contracts, see CFAP Handbook, pages 5-26 through 5-29, para. 138.F (May 22, 2020).

²⁶² CFAP Handbook, page 2-16, para. 22.A (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020); see also FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020).

²⁶³ CFAP Rule, 85 Fed. Reg. 30825, 30826, 30832 (May 21, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.5(a)(1)); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

²⁶⁴ 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)(1), (h)); CFAP Handbook, page 5-1, para. 125.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020).

Step Three: Multiply the result of Step Two by the applicable payment rate in order to determine the part of the payment that comes from CARES Act funding.²⁶⁵

b. CCC Funding Formula

The following steps are taken to determine the part of non-specialty crop payments that come from CCC funding.²⁶⁶

Step One: Determine the farmer's eligible inventory for the non-specialty crop. This is the lesser of: (1) the farmer's self-certified unpriced inventory that the farmer had a vested ownership in as of January 15, 2020; or (2) 50 percent of the farmer's 2019 production of that crop.²⁶⁷

Step Two: Multiply the result of Step One by 50 percent.

Step Three: Multiply the result of Step Two by the applicable payment rate in order to determine the portion of the CFAP payment that comes from CCC funding.²⁶⁸

c. Total Payment for Non-Specialty Crops

Farmers will receive a single CFAP payment for non-specialty crops that is the sum of the total CARES Act and CCC amounts as described above.²⁶⁹

2. Calculating Specialty Crop Payments

Specialty crop payments are based on the type of crop loss that the farmer suffered. These losses are broadly divided into three categories: (1) Sales; (2) Delivered/Unpaid; and (3) Not Delivered.²⁷⁰

²⁶⁵ For a commodity's applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)(1), (h)); see also CFAP Handbook, page 2-17, para. 22.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020).

²⁶⁶ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)(2), (h)).

²⁶⁷ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)(1), (h)); CFAP Handbook, page 5-1, para. 125.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020).

²⁶⁸ For a commodity's applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)(1), (h)); see also CFAP Handbook, page 2-17, para. 22.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020).

²⁶⁹ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)); CFAP Handbook, page 5-1, para. 125.B (May 22, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

²⁷⁰ CFAP Handbook, page 8-1, para. 211.A (May 22, 2020).

Specialty crops that fall within the Sales category, are those that were sold between January 15, 2020, and April 15, 2020.²⁷¹ Specialty crops in the Delivered/Unpaid category are crops for which no payment was received because they were harvested and shipped, but later spoiled due to a loss of marketing channels between January 15, 2020, and April 15, 2020. Specialty crops in the Not Delivered category are mature crops that remained unharvested, or unpriced specialty crops that did not leave the farm, between January 15, 2020, and April 15, 2020.²⁷²

In order to be eligible for a CFAP payment, all specialty crops must be subject to price risk.²⁷³ This means that—as of January 15, 2020—the specialty crop cannot have been subject to an agreed-upon future price, either through a forward contract, agreement, or similar binding document.²⁷⁴ Put differently, to be eligible for CFAP, the price of the commodity needs to be unknown as of January 15, 2020.

A farmer's total CFAP payment for specialty crops will be the sum of the payment calculations from each of the three above categories.

a. CARES Act Funding—Crops in Category 1 (Sales) and Category 2 (Delivered/Unpaid)

Money from the CARES Act is funds specialty crop losses that fall into the Sales and Delivered/Unpaid categories.²⁷⁵ The Sales category of specialty crops includes those crops that were sold between January 15, 2020, and April 15, 2020. Delivered/Unpaid specialty crops are those for which no payment was received because they were harvested and shipped but later spoiled due to a loss of marketing channels between January 15, 2020, and April 15, 2020.

The payment calculations for each of these categories is described below.

²⁷¹ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b), (h)); CFAP Handbook, page 8-1, para. 211.A (May 22, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “How are payments determined?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

²⁷² CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b), (h)); CFAP Handbook, page 8-1, para. 211.A (May 22, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “How are payments determined?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

²⁷³ USDA sometimes refers to crops that are subject to price risk as being “unpriced.” See CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Unpriced inventory”); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What does ‘unpriced’ or ‘subject to price risk’ mean?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>; FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁷⁴ For examples of forward contracts, see CFAP Handbook, pages 5-26 through 5-29, para. 138.F (May 22, 2020).

²⁷⁵ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(1)-(2), (h)); CFAP Handbook, page 8-1, para. 211.A (May 22, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

(i) Category 1: Crops Sold Between January 15, 2020 and April 15, 2020

The following steps are used to figure a farmer's payment for specialty crops that were sold between January 15, 2020, and April 15, 2020.²⁷⁶

Step One: Determine the quantity of eligible specialty crops sold between January 15, 2020 and April 15, 2020. Farmers must maintain records (such as bills of sale) that document the price they received for the crop.²⁷⁷ Records to be kept are discussed in more detail below.

Step Two: Multiply the result of Step One by the applicable payment rate in order to determine the portion of a farmer's payment from Category 1 specialty crops.²⁷⁸

(ii) Category 2: Crops Delivered/Unpaid Between January 15, 2020 and April 15, 2020

The following steps are used to figure a farmer's payment for specialty crops in the Delivered/Unpaid category—those crops for which no payment was received because they were harvested and shipped, but later spoiled, due to a loss of marketing channels between January 15, 2020, and April 15, 2020.²⁷⁹

Step One: Determine the quantity of specialty crops that fall within the category of Delivered/Unpaid. Farmers must have documentation to show that no payment was received for these specialty crops.²⁸⁰ Such documentation could include a letter from the buyer explaining that no payment was made. This documentation requirement applies to farmers who have met their contract requirements by delivering crops to a buyer, but the farmer has not been paid.

²⁷⁶ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(1), (h)); CFAP Handbook, page 8-46, para. 235.A (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁷⁷ See FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁷⁸ For the applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(1), (h)); see also CFAP Handbook, pages 2-18 and 2-19, para. 22.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁷⁹ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(2), (h)); CFAP Handbook, page 8-46, para. 235.A (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁸⁰ See FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

Step Two: Multiply the result of Step One by the applicable payment rate in order to determine the portion of a farmer's payment from Delivered/Unpaid specialty crops.²⁸¹

b. CCC Funding—Crops in Category 3 (Not Delivered)

Money from CCC funds is used to make payments for losses of specialty crops that fall within the third category of Not Delivered.²⁸² These include mature crops that remained unharvested between January 15, 2020, and April 15, 2020, due to a lack of marketing channels. For example, this would include crops that were plowed under.²⁸³ Crops in the Not Delivered category also include unpriced specialty crops that did not leave the farm between January 15, 2020, and April 15, 2020 due to a loss of marketing channels. This would include, for example, crops that the farmer harvested, but which remained on the farm in crates because the farmer no longer had a market for them.²⁸⁴

The following steps are used to calculate the payment for specialty crops that fall within the category of Not Delivered.²⁸⁵

Step One: Determine the quantity of eligible specialty crops that fall within the category of Not Delivered. If asked to by USDA, farmers must provide supporting documentation to verify their stated quantities.²⁸⁶

Step Two: Multiply the result of Step One by the applicable payment rate in order to determine the portion of a farmer's payment for specialty crops that fall into the Not Delivered category.²⁸⁷

²⁸¹ For the applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(2), (h)); see also CFAP Handbook, pages 2-18 and 2-19, para. 22.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁸² CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3), (h)); CFAP Handbook, page 8-1, para. 211.A-B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁸³ FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁸⁴ FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁸⁵ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3), (h)); CFAP Handbook, page 8-46, para. 235.A (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

²⁸⁶ See FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020). The Fact Sheet states that AMS will use this documentation to verify a farmer's Category 3 crop quantities on a case-by-case basis.

²⁸⁷ For the applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(2), (h)); see also CFAP Handbook, pages 2-18 and 2-19, para. 22.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

c. Total Payment for Specialty Crops

A farmer's CFAP payment for specialty crops will be paid in one total amount, equal to the sum of the total CARES Act and CCC amounts, as calculated from the three specialty crop categories described above.²⁸⁸

3. Calculating Livestock Payments—Cattle, Hogs, Pigs, Lamb, and Yearlings

CFAP payments for all eligible livestock—meaning cattle, hogs, pigs, lamb, and yearlings—are calculated in the same way.²⁸⁹ CARES Act funding is used to pay for losses to livestock that were sold between January 15, 2020, and April 15, 2020. CCC funds are used to pay for losses related to livestock that remained in inventory between January 16, 2020, and May 14, 2020.

As with all other commodities, in order for livestock to be eligible for a CFAP payment they must be subject to price risk.²⁹⁰ This means that—as of January 15, 2020—the livestock cannot be subject to an agreed-upon future price, either through a forward contract, agreement, or similar binding document.²⁹¹ Put differently, to be eligible, the price of the livestock needs to be unknown as of January 15, 2020.

The steps for livestock payment calculations are outlined below.²⁹²

a. CARES Act Funding—Livestock Sold Between January 15, 2020 and April 15, 2020

The following steps are taken to set the part of livestock payments that come from CARES Act funding.²⁹³ These steps should be followed for each species and class of eligible livestock.

²⁸⁸ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)); CFAP Handbook, page 8-45, para. 235.A (May 22, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020).

²⁸⁹ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f), (h)); CFAP Handbook, page 6-45, para. 188.B (May 22, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “How are payments determined?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

²⁹⁰ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Unpriced inventory”); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What does ‘unpriced’ or ‘subject to price risk’ mean?” (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>; FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020).

²⁹¹ For examples of forward contracts, see CFAP Handbook, pages 5-26 through 5-29, para. 138.F (May 22, 2020).

²⁹² For examples of how CFAP livestock payments are calculated, see CFAP Handbook, pages 6-46 through 6-49, para. 188.C (May 22, 2020).

²⁹³ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f), (h)); CFAP Handbook, page 6-45, para. 188.B (May 22, 2020).

Step One: Determine the number of eligible livestock—by species and class—that were sold between January 15, 2020, and April 15, 2020.²⁹⁴ This number should include any offspring from that inventory that were born before April 15, 2020.²⁹⁵

Step Two: Multiply the result of Step One by the pre-set CARES Act payment rate for that species.²⁹⁶ This amount is the CARES Act part of a farmer's livestock payment.

b. CCC Funding—Livestock Remaining in Inventory Between January 16, 2020 and May 14, 2020

The following steps are taken to figure the part of livestock payments that come from CCC funding.²⁹⁷ These steps should be followed for each species and class of eligible livestock.

Step One: Determine the largest number of unpriced inventory—by species and class—that the farmer had between April 16, 2020, and May 14, 2020.²⁹⁸

Step Two: Multiply the result of Step Three by the pre-set CCC payment rate for that species.²⁹⁹ This amount represents the CCC part of a farmer's livestock payment.

c. Total Payment for Livestock

A farmer's CFAP payment for livestock is the total of the CARES Act and CCC payments, as calculated above.³⁰⁰

²⁹⁴ CFAP Rule, 85 Fed. Reg. 30825, 30826, 30832 (May 21, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020).

²⁹⁵ CFAP Handbook, page 6-45, para. 188.B (May 22, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020).

²⁹⁶ For the applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f), (h)); see also CFAP Handbook, page 2-17, para. 22.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020).

²⁹⁷ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f), (h)); CFAP Handbook, page 6-45, para. 188.B (May 22, 2020).

²⁹⁸ FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020).

²⁹⁹ For the applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f), (h)); see also CFAP Handbook, page 2-17, para. 22.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020).

³⁰⁰ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)); CFAP Handbook, page 6-45, para. 188.B (May 22, 2020).

4. Calculating Dairy Payments

CFAP payments for dairy losses are calculated based upon the farmer's milk production from the first quarter of 2020, meaning January, February and March of 2020.³⁰¹ This production includes milk that was dumped.³⁰² CARES Act funding is used to compensate farmers for first quarter production losses, while CCC funds are used to compensate for expected increased production in the second quarter of 2020.³⁰³

The steps for dairy payment calculations are outlined below.³⁰⁴

a. CARES Act Funding Formula

The following steps are taken to figure the part of dairy payments that come from CARES Act funding.³⁰⁵

Step One: Determine the farmer's first quarter milk production in pounds for 2020, meaning production from January, February and March 2020.

Step Two: Multiply the result of Step One by the pre-set CARES Act payment rate.³⁰⁶ This amount represents the CARES Act portion of a farmer's dairy payment.

b. CCC Funding Formula

The following steps are taken to figure the part of dairy payments that come from CCC funding.³⁰⁷

³⁰¹ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e)); CFAP Handbook, page 4-71, para. 111.A-B (May 22, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

³⁰² USDA, Coronavirus Food Assistance Program FAQ, "If a dairy producer had to dump milk, will his/her dumped milk be covered?" (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>; FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (May 2020).

³⁰³ In order to determine a farmer's quarter two losses, USDA uses the farmer's production from quarter one and multiplies that production by an adjustment factor in order to account for increased second quarter production. See 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 4-71, para. 111.A-B (May 22, 2020).

³⁰⁴ For examples of how CFAP dairy payments are calculated, see CFAP Handbook, pages 4-72 through 4-74, para. 111.C (May 22, 2020).

³⁰⁵ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e)(1)); CFAP Handbook, page 4-71, para. 111.B (May 22, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

³⁰⁶ For the applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e), (h)); see also CFAP Handbook, page 2-17, para. 22.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (May 2020).

³⁰⁷ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e)(2)); CFAP Handbook, page 4-71, para. 111.B (May 22, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20,

Step One: Determine the farmer's first quarter milk production in pounds, for 2020, meaning production from January, February and March 2020.

Step Two: Multiply the result of Step One by an adjustment factor of 1.014.³⁰⁸ This factor is intended to account for increased production in quarter two of calendar year 2020.

Step Three: Multiply the result of Step Two by the pre-set CCC payment rate.³⁰⁹ This resulting amount represents the CCC part of a farmer's dairy payment.

c. Total Payment for Dairy

A farmer's dairy CFAP payment is the sum of the CARES Act and CCC payments, as calculated above.³¹⁰

5. Calculating Wool Payments

In general, CFAP payments for wool are based on a farmer's unpriced inventory as of January 15, 2020.³¹¹ This means the farmer's wool inventory that was not subject to an agreed-upon future price, either through a forward contract, agreement, or similar binding document, as of January 15, 2020.³¹² For purposes of CFAP, wool is divided into two classes, graded wool (paid on a clean basis) and non-graded wool (paid on an uncleaned basis).³¹³

a. CARES Act Funding Formula

The following steps are taken to figure the part of wool payments that come from CARES Act funding.³¹⁴

2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

³⁰⁸ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (May 2020).

³⁰⁹ For the applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e), (h)); see also CFAP Handbook, page 2-17, para. 22.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (May 2020).

³¹⁰ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e)); CFAP Handbook, page 4-71, para. 111.B (May 22, 2020).

³¹¹ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)); FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020).

³¹² CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Unpriced inventory"); CFAP Handbook, pages 5-1 and 5-2, para. 125.B-C (May 22, 2020). FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "What does 'unpriced' or 'subject to price risk' mean?" (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>; FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020). For examples of forward contracts, see CFAP Handbook, pages 5-26 through 5-29, para. 138.F (May 22, 2020).

³¹³ CFAP Handbook, page 5-22, para. 137.B (May 22, 2020).

³¹⁴ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)(1)); CFAP Handbook, page 5-1, para. 125.B (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020).

Step One: Determine the farmer's eligible inventory for wool. This is the lesser of: (1) the farmer's unpriced wool inventory as of January 15, 2020; and (2) 50 percent of the farmer's 2019 production of wool.³¹⁵

Step Two: Multiply the result of Step One by the pre-set CARES Act payment rate.³¹⁶ This amount is the CARES Act part of a farmer's wool payment.

b. CCC Funding Formula

The following steps are taken to calculate the part of wool payments that come from CCC funds.³¹⁷

Step One: Determine the farmer's eligible inventory for wool. This is the lesser of: (1) the farmer's unpriced wool inventory as of January 15, 2020; and (2) 50 percent of the farmer's 2019 production of wool.

Step Two: Multiply the result of Step One by the pre-set CCC payment rate.³¹⁸ This amount represents the CCC portion of a farmer's wool payment.

c. Total Payment for Wool

A farmer's CFAP payment for wool is the total of the CARES Act and CCC wool payments, as calculated above.³¹⁹

E. Payments Not Subject to Offset

Payments received under the CFAP direct payments are not subject to USDA offset.³²⁰ This means that CFAP payments will not be withheld by USDA in order to satisfy a USDA debt.

³¹⁵ CFAP Handbook, page 5-1, para. 125.B (May 22, 2020).

³¹⁶ For the applicable payment rate, see CFAP Rule, 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)(1), (h)); see also CFAP Handbook, page 5-51, para. 151.A (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020).

³¹⁷ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)(2)); CFAP Handbook, page 5-1, para. 125.B (May 22, 2020); USDA, Coronavirus Food Assistance Program for Wool Producers (May 2020).

³¹⁸ For the applicable payment rate, see 85 Fed. Reg. 30825, 30832-30833, Table 1 to Paragraph (h) (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)(2), (h)); see also CFAP Handbook, page 5-51, para. 151.A (May 22, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020).

³¹⁹ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)); CFAP Handbook, page 5-1, para. 125.B (May 22, 2020).

³²⁰ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(c)); CFAP Handbook, page 2-14, para. 22.A (May 22, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "Can CFAP payments be withheld to satisfy a USDA debt?" (May 27, 2020), at: <https://www.farmers.gov/cfap/faq>.

F. Payment Not Subject to Liens

USDA will make CFAP payments to the farmer regardless of whether there are existing liens on the commodities that led to CFAP eligibility.³²¹

G. Accepting CFAP Payments Means Authorizing Inspections

Any farmer who receives a CFAP payment must let USDA to enter the farm during regular business hours to inspect and examine the farm.³²² The farmer must also permit USDA to make copies of books, records, or other items for the purpose of confirming the accuracy of the information the farmer provided.

IX. Payment Limitations

USDA has a set of rules—often called payment limitations—that put caps on the payments that can be received under USDA programs. A form of these rules applies to CFAP.³²³ Payment limitations can be complicated, as can the strategies used by farmers to limit the effect of these rules.³²⁴ USDA describes the payment limitation rules that apply for CFAP in detail.³²⁵

A. General Rule—\$250,000

In general, no person may receive more than 250,000 dollars in CFAP payments.³²⁶ This limitation applies to the combined total of all CFAP payments for all eligible commodities. The same limit applies to legal entities—except general partnerships and joint ventures. The rules for joint operations, including general partnerships and joint ventures, are somewhat different.³²⁷

B. For Some Entities—\$500,000 or \$750,000

For a corporation, LLC, or LP, the payment limit may be increased to 500,000 dollars, and in some cases to 750,000 dollars.³²⁸ These added amounts are possible if shareholders,

³²¹ Cite: CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(c)).

³²² CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.6(b)); CFAP Handbook, page 1-11, para. 3.G (May 22, 2020). This includes authorized representatives of USDA and the Government Accountability Office (GAO).

³²³ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1)); CFAP Handbook, page 2-3, para. 16.A (May 22, 2020); Notice CFAP-4, page 6, para. 3.A (May 20, 2020).

³²⁴ For payment limitation rules, see 7 C.F.R. pt. 1400 (2020); FSA Handbook, 5-PL (Amendment 6), Payment Eligibility, Payment Limitation, and Average Adjusted Gross Income—Agricultural Act of 2014, pages 5-1 to 5-5, paras. 274- (October 2, 2019).

³²⁵ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); CFAP Handbook, pages 2-3 through 2-6, para. 16 (May 22, 2020).

³²⁶ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1)); CFAP Handbook, page 2-3, para. 16.A (May 22, 2020); Notice CFAP-4, page 6, para. 3.A (May 20, 2020).

³²⁷ CFAP Handbook, page 2-3, para. 16.A (May 22, 2020); Notice CFAP-4, page 6, para. 3.A (May 20, 2020). Payments for joint operations, including a general partnership or joint venture, cannot be more than \$250,000 per person or legal entity that comprise first-level ownership of the general partnership or operation. This rule does not apply if the first-level member is another joint operation.

³²⁸ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(2)); CFAP Handbook, pages 2-3 through 2-6, para. 16.B-C (May 22, 2020); Notice CFAP-4, page 6, para. 3.B (May 20, 2020). For a corporate entity with one shareholder who contributes substantial labor or

members, or partners provide a certain amount of personal labor or active personal management.

C. Attribution Rules

For CFAP, USDA will apply what are known as attribution rules that attempt to attribute payments to both direct and indirect ownership interests.³²⁹

X. Heirs Property

Many people with heirs' property have had an extremely hard time gaining access to USDA programs. In general, heirs' property is land inherited by two or more people as tenants in common. If the property passes to other generations, there is not a clear title of ownership for the person farming the land. This problem would not appear to create difficulties for CFAP. The CFAP program does not require land ownership.³³⁰

XI. CFAP and Appeals

In general, farmers have the right to appeal certain decisions that USDA makes with respect to CFAP.³³¹ There is a national appeals division (NAD) that oversees the appeals of USDA decisions.³³²

Examples of issues that are appealable include a determination of ineligibility for CFAP, denial of CFAP benefits, or a decision that the farmer has not complied with CFAP requirements.³³³ On the other hand, decisions based on rules that are generally applicable to similarly situated farmers who apply for CFAP are not appealable.³³⁴ Determinations of payment rates and the eligibility of specific commodities for CFAP are also not appealable.³³⁵ A lengthy set of rules governs the USDA appeals system.³³⁶

management, the limitation is \$250,000. For a corporate entity with two shareholders providing substantial labor or management, the limitation is \$500,000. For a corporate entity with three shareholders providing substantial labor or management, the limitation is \$750,000. Substantial labor or management requires that the shareholder provide at least 400 hours of active personal labor or active personal management, or a combination of the two, with respect to the eligible commodity, crop, or livestock.

³²⁹ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1), (3)); CFAP Handbook, page 2-6, para. 16.D (May 22, 2020); Notice CFAP-4, page 6, para. 3.C (May 20, 2020). The attribution rules at 7 C.F.R. § 1400.105 (2020) also apply.

³³⁰ Changes made in the 2018 Farm Bill sought to ease restrictions on USDA programs that flowed from failure to own farmland. See 7 U.S.C. § 2266b.

³³¹ CFAP Rule, 85 Fed. Reg. 30825, 30827 (prefatory remarks), 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(b)); CFAP Handbook, page 3-8, para. 51.E (May 22, 2020). The appeal regulations that apply to CFAP are found at 7 C.F.R. pts. 11 and 780.

³³² The rules for NAD appeals can be found in FSA Handbook, 1-APP (Revision 2), Program Appeals, Mediation, and Litigation (September 12, 2016), at: https://www.fsa.usda.gov/Internet/FSA_File/1-app_ro2_a15.pdf.

³³³ 7 C.F.R. § 780.4(b) (2020); FSA Handbook, 1-APP, page 2-3, para. 9.A (September 12, 2016).

³³⁴ CFAP Rule, 85 Fed. Reg. 30825, 30827 (prefatory comments) (May 21, 2020); see also 7 C.F.R. § 780.5(a) (2020).

³³⁵ CFAP Rule, 85 Fed. Reg. 30825, 30827 (prefatory comments) (May 21, 2020).

³³⁶ See 7 C.F.R. pts. 11 and 780; see also FSA Handbook, 1-APP (September 12, 2016).

XII. Discrimination is Illegal

USDA is prohibited from subjecting any person to discrimination on the basis of race, color, religion, sex, age, national origin, marital status, familial/parental status, sexual orientation, gender identity, disability, political beliefs, or because all or part of an individual's income is derived from any public assistance program.³³⁷

³³⁷ 7 C.F.R. § 15d.3(a) (2020).

Chapter Three: Farmers to Families Food Box Program

I. Introduction

On April 17, 2020 United States Secretary of Agriculture, Sonny Perdue, announced that under CFAP USDA will purchase about three billion dollars of fresh produce, dairy, and meat.³³⁸ The food will eventually result in boxes of fresh produce, dairy and meat to food banks, community and faith-based organizations, and other nonprofits. This program is called the Farmers to Families Food Box Program (Food Box Program), and it is being administered through USDA's Agricultural Marketing Service (AMS).

II. Overview of Program—Contracts, Boxes, Distribution

There are three main steps in terms of how the Food Box Program operates. First, the U.S. government will make purchases of fresh fruits and vegetables, dairy, and meat directly from farmers and regional distributors that the government will contract with. Second, food boxes must be assembled. And finally, the food boxes will be distributed to eligible recipients.

A. Government Contracts for Purchases of Food—Request for Proposals

On April 24, 2020, a Request for Proposal (RFP) was published on the AMS website. It sought proposals from those interested in contracting with the government to coordinate and distribute food boxes.³³⁹ The deadline to submit an RFP was May 1, 2020.

Through the RFPs, AMS is contracting with farmers and other organizations and entities on a regional basis in order to distribute food boxes to eligible recipients.³⁴⁰ Those who are awarded contracts are responsible for all aspects of the contract performance. This means they must source the food for the boxes, prepare the food boxes, connect with eligible recipients, and deliver the food boxes to those recipients on a recurring basis.³⁴¹

On May 8, 2020, AMS published the list of contract award recipients, amounting to a total of roughly 1.2 billion dollars.³⁴² It is unknown whether AMS will release a second round of RFPs for the program.

³³⁸ See AMS, USDA to Purchase Up to \$3 Billion in Agricultural Commodities, Issue Solicitations for Interested Participants (April 19, 2020), at: <https://www.ams.usda.gov/content/usda-purchase-3-billion-agricultural-commodities-issue-solicitations-interested>; see also USDA Farmers to Families Food Box, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

³³⁹ The RFP is available on the AMS website, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

³⁴⁰ There are five regions: Mid-Atlantic, Midwest, Mountain Plains, Northeast, and Southeast. See RFP—ERAcquisition (pdf), page 6, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>. The original RFP was later amended to add the state of Louisiana as part of the southwest region. The amended RFP is also on the AMS website, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

³⁴¹ See Request for Proposals Frequently Asked Questions, at: <https://www.ams.usda.gov/publications/content/request-proposals-frequently-asked-questions>.

³⁴² See USDA, Announcement of Contract Awards for the Farmers to Families Food Box Program (May 8, 2020), at: <https://www.ams.usda.gov/sites/default/files/media/AnnouncementofContractAwards.pdf>.

B. Types Eligible Food Boxes

The farmers and distributors who receive contracts under this program must provide one of five different types of food boxes to eligible nonprofits or government entities. The available types of food boxes include: (1) fresh fruit and vegetable box; (2) dairy products box; (3) pre-cooked meat box, of chicken and pork only; (4) a combination box including all of the eligible products; and (5) a fluid milk box.³⁴³ Under this program, the distributors and recipients can mutually agree on the size and weight of the food boxes, as well as the specific type of contents, which may depend on availability and local preferences.³⁴⁴

C. Eligible Recipients of Food Boxes

The food boxes must be distributed to eligible recipients. Nonprofit entities that have a IRS section 501(c)(3) tax exempt status, as well as government entities, are eligible to receive food boxes.³⁴⁵ This means that food banks, food pantries, schools, community and faith-based organizations, and other nonprofits and governmental organizations can be eligible to receive food boxes.³⁴⁶ Indian tribal organizations qualify as government entities, and are eligible as well.³⁴⁷

III. Timeline for Delivery of Boxes

The initial timeframe for delivery of the food boxes, what AMS is calling the “base period,” runs from May 15, 2020 through June 30, 2020.³⁴⁸ There are also three additional two-month “option periods” that can extend the timeframe within which to deliver the boxes. The option periods are July-August, September-October, or November-December. Those who submitted proposals were allowed to offer different prices for the different option periods.

There is no pre-determined delivery schedule for the food boxes. Instead, those applicants who submitted proposals were required to include a delivery schedule that was mutually agreed upon by the applicant and the recipient organizations.³⁴⁹

IV. Allocation of Funds

Out of the three billion dollars in funding for the Food Box Program, USDA states that it will purchase \$461 million dollars of fresh fruits and vegetables, \$317 million of dairy products,

³⁴³ See RFP—ERAcquisition (pdf), page 5, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>. Raw milk is not allowed under the Food Box Program. See Request for Proposals Frequently Asked Questions, at: <https://www.ams.usda.gov/publications/content/request-proposals-frequently-asked-questions>.

³⁴⁴ See Farmers to Families Food Box Program FAQs..

³⁴⁵ See Farmers to Families Food Box Program FAQs

³⁴⁶ See Request for Proposals Frequently Asked Questions; see also RFP—ERAcquisition (pdf), page 6, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>; Farmers to Families Food Box Program FAQs, at: <https://www.ams.usda.gov/publications/content/farmers-families-food-box-program-faqs>.

³⁴⁷ See Farmers to Families Food Box Program FAQs.

³⁴⁸ See Request for Proposals Frequently Asked Questions, at:; see also RFP—ERAcquisition (pdf), page 6.

³⁴⁹ See Request for Proposals Frequently Asked Questions, at: <https://www.ams.usda.gov/publications/content/request-proposals-frequently-asked-questions>; see also RFP—ERAcquisition (pdf), Exhibit 2.

\$258 million of meat products, and \$175 million of combination boxes that include a mixture of fresh produce, dairy and meat products.³⁵⁰

³⁵⁰ See AMS, USDA Farmers to Families Food Box, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.