

Farmers' Guide to Coronavirus Food Assistance Program (CFAP)

Second Edition

June 17, 2020

Farmer Legal Assistance Hotline
877-860-4349

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Farmers' Legal Action Group

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June 17, 2020

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Copyedited by Wendy Reid

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Chapter One: Introduction

This Second Edition of the Farmers' Guide to the Coronavirus Food Assistance Program (CFAP) describes 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.¹

I. Agricultural Relief Programs Under the CARES Act

The CARES Act devoted significant resources to agriculture.² 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.³ 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.⁴ This money will not be available to the CCC until after June 2020.⁵ 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.⁶

¹ Thanks to Farm Aid, the National Sustainable Agriculture Coalition (NSAC), the Intertribal Agriculture Council (IAC), and the Indigenous Food and Agriculture Initiative (IFAI) for helpful suggestions.

² 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.

³ 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>.

⁴ CARES Act, § 11002.

⁵ 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>.

⁶ 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 CFAP Rule, 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/ccc_fact_sheet_oct2015.pdf. A recent use of CCC funds was Market Facilitation Program payments.

Second, the CARES Act gave the United States Department of Agriculture (USDA) 9.5 billion dollars.⁷ 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 providing support for agricultural producers impacted by coronavirus.” In other words, the 9.5 billion dollars must provide support for agricultural producers.⁸ Those agricultural producers need to 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.⁹

B. USDA Coronavirus Food Assistance Program (CFAP)

On April 17, 2020, USDA announced how some of the CARES Act money will be spent—through the Coronavirus Food Assistance Program (CFAP), which the USDA is funding with 19 billion dollars.¹⁰

Under the umbrella of CFAP are two separate programs.¹¹ 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.¹²

As it stands now, about 16 billion dollars in total may be spent through CFAP for direct farmer payments.¹³ 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. USDA describes its understanding of CARES Act funding and its purpose at CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

⁸ CARES Act, Division B, Title 1.

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 (April 17, 2020).

¹¹ Press Release, USDA Announces Coronavirus Food Assistance Program (April 17, 2020).

¹² CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

¹³ 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 (April 17, 2020); 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?” (June 9, 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.¹⁴

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.¹⁵ The food will eventually result in boxes of fresh produce, dairy and meat to food banks, community and faith-based organizations, and other nonprofits.¹⁶

II. Current Through June 16, 2020

This Second Edition of the Guide is current through June 16, 2020. The First Edition was published on May 29, 2020

¹⁴ CFAP Rule, 85 Fed. Reg. 30825, 30834 (to be codified at 7 C.F.R. § 9.5(k)). 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?” (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

¹⁵ USDA Farmers to Families Food Box, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

¹⁶ 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.¹⁷ 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.¹⁸

II. Authority and Rules for CFAP Direct Payments Program

CFAP direct payments will be implemented by the USDA Farm Service Agency (FSA).¹⁹ 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 2020.²⁰ This includes specialty crops that were shipped but spoiled and no payment was received.²¹ 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.²²

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.²³ 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.²⁴

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

²⁰ 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>.

²¹ CARES Act, Division B—Emergency Appropriations for Coronavirus Health Response and Agency Operations, Title I, Agricultural Programs, Office of the Secretary.

²² CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

²³ 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>.

²⁴ 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 commodities from normal marketing channels that may be currently unavailable.” CFAP Rule, 85

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.²⁵

B. USDA Regulations

Regulations for CFAP can be found in a final rule that appeared in the Federal Register on May 21, 2020.²⁶ Those regulations will eventually become a part of the Code of Federal Regulations.²⁷ USDA issued a version of the regulations before they appeared in the Federal Register.²⁸ A corrected CFAP rule was published in the Federal Register on June 12, 2020.²⁹

C. Handbooks

FSA issues Handbooks that control many aspects of various FSA programs. To date, FSA has issued a Handbook for CFAP, as well as one Handbook amendment.³⁰ FSA has also relied on other Handbooks to set part of the CFAP rules.³¹

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.³² This Guide includes Notices released to the public by USDA through June 16, 2020.

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.

²⁵ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments).

²⁶ CFAP Rule, 85 Fed. Reg. 30825 (May 21, 2020) (to be codified at 7 C.F.R. pt. 9).

²⁷ CFAP regulations will be found at 7 C.F.R. Part 9.

²⁸ 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).

²⁹ Coronavirus Food Assistance Program; Correction (CFAP Rule Correction), 85 Fed. Reg. 35799 (June 12, 2020).

³⁰ 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; see also FSA Handbook, 1-CP, Coronavirus Food Assistance Program (Amendment 2) (May 29, 2019), at: https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a02.pdf

³¹ 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>.

³² 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>.

E. Other USDA Information

USDA sometimes sets policy for CFAP and other programs through the USDA website.³³ Because USDA's Farm Service Agency (FSA) has been designated to run CFAP, some of this information is likely to be posted by FSA.³⁴

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-19.³⁵ 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.³⁶ 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.³⁷

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.

³³ 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 (June 9, 2020), at <https://www.farmers.gov/cfap/faq>.

³⁴ 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-releases/2020/usda-announces-details-of-direct-assistance-to-farmers-through-the-coronavirus-food-assistance-program>.

³⁵ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); FSA Notice CFAP-4, page 1, para. 1.A (May 20, 2020).

³⁶ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); FSA Notice CFAP-4, page 1, para. 1.A (May 20, 2020).

³⁷ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

1. Person or Legal Entity

An eligible producer can be a natural person.³⁸ 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.

(i) U.S. Citizen

An individual farmer can be an eligible producer if the farmer is a United States citizen.³⁹

(ii) Resident Alien

If the farmer is a person, the farmer can be an eligible producer if the farmer is a resident alien.⁴⁰ In general, that means a person must have a valid Form I-551 card.⁴¹ These are commonly called Green Cards, though officially they are called Permanent Resident Cards.⁴²

(iii) Foreign Person

A foreign person may be an eligible producer under CFAP rules.⁴³

³⁸ 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 29, 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.

³⁹ 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 29, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

⁴⁰ 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 29, 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)).

⁴¹ CFAP Handbook, page 2-1, para. 15.A (May 29, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

⁴² USDA rules sometimes refer to Form I-551 as a Resident Alien Card. CFAP Handbook, page 2-1, para. 15.A (May 29, 2020); 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>.

⁴³ 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 29, 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).

For the purposes of CFAP, a foreign person is defined in USDA rules and has two parts.⁴⁴ 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.⁴⁵ 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.⁴⁶ Actively engaged, for this purpose, means 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.⁴⁷ Active personal labor is defined by FSA, and means to personally provide physical activities needed for a farming operation.⁴⁸ 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.⁴⁹ 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.⁵⁰ As of now, it is unclear which standard USDA will apply to foreign persons seeking eligibility for CFAP.

⁴⁴ 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).

⁴⁵ 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>.

⁴⁶ 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).

⁴⁷ 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).

⁴⁸ 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.

⁴⁹ 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).

⁵⁰ 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).

Second, a farmer that is a foreign person under FSA rules must provide capital for the farm.⁵¹ Capital, for this purpose, is defined by FSA.⁵² In general, capital means the funding provided to the farming operation in order to conduct farming activities.⁵³ 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.⁵⁴ The land can be leased by the foreign person.⁵⁵

When filling out forms for CFAP, the farmer will be asked about immigration status and for a tax identification number.⁵⁶ There seems to be no legal barrier to participating in CFAP based solely on immigration status.

b. Eligible Legal Entities

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

(i) Partnership

A partnership can be an eligible producer.⁵⁷ All of the partners in the partnership must be citizens of the United States. A joint venture may also be eligible for CFAP.⁵⁸

(ii) Tribe or Tribal Organization

An eligible producer can be an Indian Tribe or a Tribal organization.⁵⁹

⁵¹ 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).

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

⁵³ 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.

⁵⁴ 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).

⁵⁵ 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.

⁵⁶ Form CCC-902, for example, asks for tax identification number and citizenship status. See CFAP Handbook, page 2-10, para. 19.A (May 29, 2020). Tax identification numbers do not require a certain immigration status. See IRS, Understanding Individual Identification Number (ITIN), at 5 (2019), at <https://www.irs.gov/pub/irs-pdf/p1915.pdf>.

⁵⁷ 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 29, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

⁵⁸ See CFAP Rule, 85 Fed. Reg. 30825, 30839 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1)).

⁵⁹ 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 29, 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

(iii) Corporation and Limited Liability Company (LLC)

An eligible producer can be a corporation as well as a limited liability company (LLC).⁶⁰

(iv) Cooperatives

An eligible producer, according to FSA, can include some other organizational structures that are organized under state law.⁶¹ This raises the question of whether a cooperative be an eligible producer.

It seems possible that a cooperative could qualify as an eligible producer under CFAP. The rules do not say directly that a cooperative could be eligible. And in general, it will be the farmer member of an agricultural cooperative that will be eligible for CFAP.⁶²

In some cases, however, cooperatives might be eligible. The rules do say that “other organizational structures” can be eligible as long as they are organized under state law.⁶³ The vast majority of farm cooperatives are organized under state law.⁶⁴

The challenge for a cooperative that wants to apply for CFAP as an organization is meeting other parts of the definition of eligible producer. Most farm cooperatives are either what are often called marketing cooperatives or supply cooperatives.⁶⁵ In general, marketing cooperatives assist member farmers in the marketing of the farmer member commodities. Some cooperatives buy the farm product, others negotiate a price for the sale for the farmer’s product. Supply cooperatives, on the other hand, buy inputs—such as seed, fertilizer, and so forth—at a

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.

⁶⁰ 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 29, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

⁶¹ 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 29, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

⁶² FSA says that a farmer member of a marketing cooperative should apply as the producer, and the marketing cooperatives should not apply. USDA, Coronavirus Foods Assistance Program FAQ, “Should a marketing cooperative apply, or should each grower apply separately?” (June 9, 2020).

⁶³ 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 29, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

⁶⁴ See, for example, Roger A. McEowen, *Agricultural Law in a Nutshell* 343-344 (2017).

⁶⁵ For a brief legal summary, see McEowen, at 343-346.

discount, and then sell it to the farmer members. Some cooperatives do both.

Three requirements will make many cooperatives not eligible for CFAP. First, many cooperatives do not meet the requirement, discussed below, that an eligible producer must share in the risk of producing a commodity and must be entitled to a share in the commodity available for marketing. Second, the cooperative must have an ownership interest in the commodity. Third, many cooperatives will not meet the Adjusted Gross Income (AGI) requirements that are also discussed below.

In sum, as far as the entity eligibility requirements for CFAP are concerned, nothing outright stops a cooperative from being eligible for CFAP. Other eligibility rules, however, will limit cooperative eligibility. Cooperatives, in the end, come in many shapes and sizes, and operate under a wide variety of structures for their members. Some of these cooperatives, especially relatively small cooperatives that farm collectively could well be eligible for CFAP.⁶⁶ Others will not be eligible.

But even if a cooperative, as an entity, is not eligible for CFAP, it is worth noting that the farmer members of the cooperative can be eligible for CFAP no matter what the character of the cooperative.⁶⁷

(v) Foreign Entity

A foreign entity can be an eligible producer for CFAP.⁶⁸

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.⁶⁹ As stated 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.⁷⁰ In general, if there is only one class of stock, or

⁶⁶ Smaller cooperatives that are experimenting in various and interesting ways are discussed in Annalise Jolley, *The Co-op Farming Model Might Help Save America's Small Farmers*, Civil Eats (October 3, 2018), at <https://civileats.com/2018/10/03/co-op-farming-models-might-help-save-americas-small-farms/>.

⁶⁷ USDA, Coronavirus Foods Assistance Program FAQ, "Are producers who are members of a co-op who deliver their eligible commodity to a co-op eligible for CFAP?" (June 9, 2020).

⁶⁸ 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).

⁶⁹ 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).

⁷⁰ 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

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.⁷¹ To provide active personal labor means to provide physical activities needed for a farming operation.⁷²

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.⁷³ 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. Relationship to Commodities—Must Have Risk in Production, Share in the Sale, and Ownership Interest

USDA rules require that eligible producers meet three requirements in terms of their relationship to their crops or livestock—they must share in the risk of producing the crops or livestock, they must be entitled to a share in the sale of the crops or livestock, and they must have an ownership interest in the crops or livestock.⁷⁴ These

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.

⁷¹ 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).

⁷² 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.

⁷³ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments).

⁷⁴ 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 2-2, para. 15.B, page 2-12, para. 21.A, Exhibit 2, page 2, "Producer" (May 29, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); USDA, Coronavirus Foods Assistance Program FAQ, "Who is eligible to participate in the Coronavirus Food Assistance Program?" (June 9, 2020).

requirements apply to both persons and entities, and the farmer must meet all of them in order to be considered an eligible producer.

The relationship between these three requirements can be confusing. For example, there are times when the rules suggest that having an ownership interest in crops or livestock could be the same thing as being entitled to a share in the sale of the crops or livestock.⁷⁵ In other places, FSA suggests that an ownership interest means sharing in the risk of production for a commodity.⁷⁶ Yet, there are also times where the rules suggest that having an ownership interest in the eligible crops or livestock is a separate requirement altogether.⁷⁷ Despite this confusion, when the rules and regulations are looked at as a whole, it is clear that in order to be eligible for CFAP, farmers should be prepared to show that they share in the risk of production the commodities, that they are entitled to a share in the sale of the commodities, and that they have an ownership interest in the commodities.

a. Share in Risk of Crop or Livestock

In order to be an eligible producer, the farmer must share in the risk of producing crops or livestock.⁷⁸

b. Entitled to Share of Crop or Livestock

In order to be an eligible producer, the farmer must be entitled to a share in the sale of the crop or livestock.⁷⁹ 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

⁷⁵ See, for example, CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(2)), which states that, if requested by USDA, a producer must provide documentation showing the producer's value at risk in the commodity as well as the producer's "ownership share in the commodity."

⁷⁶ See, for example, USDA, Coronavirus Foods Assistance Program FAQ, "Are aquaculture producers who harvest via fee-fishing on their farms eligible for coverage under CFAP?" (June 9, 2020), which states that only finfish producers who have "ownership risk in the production of the finfish grown for a commercial market" are eligible for CFAP.

⁷⁷ See, for example, CFAP Handbook, page 2-2, para. 15.B (May 29, 2020), which states that any person or entity without a reported ownership interest in a commodity is not eligible for CFAP.

⁷⁸ 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 2-1, para. 15.A, Exhibit 2, page 2, "Producer" (May 29, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); USDA, Coronavirus Foods Assistance Program FAQ, "Who is eligible to participate in the Coronavirus Food Assistance Program?" (June 9, 2020).

⁷⁹ 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 2-1, para. 15.A, page 6-2, para. 165.C, "Producer" (May 29, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); USDA, Coronavirus Foods Assistance Program FAQ, "Who is eligible to participate in the Coronavirus Food Assistance Program?" (June 9, 2020).

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 of 2020.⁸⁰ 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.⁸¹ 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.⁸²

(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.⁸³ 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.

⁸⁰ CFAP Handbook, page 2-1, para. 15.A (May 29, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020). The Federal Register does not include a different rule for dairy.

⁸¹ 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 29, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020).

⁸² CFAP Handbook, page 2-1, para. 15.A (May 29, 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.

⁸³ CFAP Handbook, page 2-1, para. 15.A (May 29, 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.

c. Ownership Interest

In order to be an eligible producer, the farmer must have an ownership interest in the crops or livestock.⁸⁴ The rules for CFAP do not provide one clear definition for what it means to have an ownership interest in crops or livestock. For some commodity types, however, the rules do provide specific details on what is needed to meet this requirement. This Guide will note when a commodity must satisfy a more specific definition of ownership interest.

d. Examples of the Ownership, 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. The farmer, however, would also need to have an ownership interest in the produce.

(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

⁸⁴ CFAP Handbook, page 2-2, para. 15.B, pages 2-12 and 2-13, para. 21.A-B, page 2-14, para. 22.A, page 3-8, para. 51.E (May 29, 2020); FSA Notice CFAP-4, page 3, para. 2.A, page 5, para. 2.D, pages 9-10, para. 4.B (May 20, 2020).

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.”⁸⁵

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.”⁸⁶ This seems to mean that in order for a contract grower to be 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.⁸⁷ 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.⁸⁸ 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.

⁸⁵ 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 29, 2020).

⁸⁶ USDA, Coronavirus Foods Assistance Program FAQ, “Who is eligible to participate in the Coronavirus Food Assistance Program?” (June 9, 2020).

⁸⁷ 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.

⁸⁸ 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> (June 7, 2020).

a. Conservation Compliance

A farmer applying for CFAP must meet what are known as conservation compliance requirements.⁸⁹ 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.⁹⁰ The farmer will need to certify conservation compliance when applying for CFAP.⁹¹ This requirement, which will be new for farmers that have not worked with USDA in the past, is discussed in more detail below.

b. Compliance with Adjusted Gross Income (AGI) Limitation

USDA programs sometimes condition eligibility on what are known as adjusted gross income (AGI) limitations.⁹² These AGI limits apply to CFAP.⁹³

USDA provides an explanation of how the AGI rule applies to CFAP.⁹⁴ 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.⁹⁵ For joint ventures and partnerships, the average AGI limitation is applied to each member of the business.

⁸⁹ 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 29, 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?” (June 9, 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 (2020).

⁹⁰ 7 C.F.R. § 12.1(a) (2020).

⁹¹ 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, pages 2-8 and 2-9, para. 18.A (May 29, 2020); FSA Notice CFAP-4, page 7, para. 3.E (May 20, 2020).

⁹² 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); see, as well, FSA Notice PL-289, Coronavirus Food Assistance Program (CFAP) 75 percent Farm AGI Certifications (June 1, 2020), at: https://www.fsa.usda.gov/Internet/FSA_Notice/pl_289.pdf.

⁹³ CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(d)); CFAP Handbook, page 2-2, para. 15.B, page 2-7, para. 17.A (May 29, 2020); Notice CFAP-4, page 6, para. 3.D (May 20, 2020). For additional information on the CFAP AGI rules as they relate to farm income, see FSA Notice PL-289, CFAP AGI Certifications (June 1, 2020).

⁹⁴ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory remarks); see also CFAP Handbook, page 2-7, para. 17.A (May 29, 2020).

⁹⁵ 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 29, 2020); Notice CFAP-4, page 6, para. 3.D (May 20, 2020).

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.⁹⁶

c. Compliance with Controlled Substance Rules

To be eligible for a CFAP payment, a farmer must comply with certain controlled substance rules.⁹⁷ This means that a person that is convicted of a controlled substance violation will be ineligible, at least for a time, for CFAP.⁹⁸ In particular, the conviction cannot be for planting, cultivating, growing, producing, harvesting, or storing a controlled substance.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ 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.¹⁰² From USDA's perspective, these may mean the same thing as having an ownership interest.

⁹⁶ 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 29, 2020); Notice PL-289, page 1, para. 1.A (June 1, 2020); Notice CFAP-4, page 6, para. 3.D (May 20, 2020).

⁹⁷ CFAP Handbook, page 2-9, para. 18.B (May 29, 2020); FSA Notice CFAP-4, page 7, para. 3.E (May 20, 2020).

⁹⁸ 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 2-9, para. 18.B (May 29, 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).

⁹⁹ 7 C.F.R. § 718.6(b) (2020).

¹⁰⁰ 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. § 1639o(1); see also FSA Handbook, 1-CM, page 30-1, para. 871.B (January 2, 2020). For more discussion of hemp, see 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>.

¹⁰¹ CFAP Handbook, page 2-2, para. 15.B (May 29, 2020); FSA Notice CFAP-4, pages 3, 5, 9 paras. 2.A, 2.D, 4.A (May 20, 2020).

¹⁰² CFAP Handbook, page 2-1, para. 15.A (May 29, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

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.¹⁰³ Suspended and debarred people are banned from a broad range of government programs.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ Public schools are defined under FSA rules.¹⁰⁷ 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 funds it is defined as a public school.¹⁰⁸ Predominant amount is not defined in FSA rules. A predominant amount probably means the majority.¹⁰⁹ 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.¹¹⁰

¹⁰³ CFAP Handbook, page 2-2, para. 15.B (May 29, 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).

¹⁰⁴ 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).

¹⁰⁵ 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).

¹⁰⁶ CFAP Handbook, page 2-2, para. 15.B (May 29, 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).

¹⁰⁷ FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 7, “Public School” (October 2, 2019).

¹⁰⁸ 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).

¹⁰⁹ 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).

¹¹⁰ CFAP Handbook, page 2-2, para. 15.B (May 29, 2020); FSA Notice CFAP-4, page 5, para. 2.D (May 20, 2020). The CFAP Notice incorporates the definitions in FSA Handbook, 5-PL, Payment Eligibility Handbook (October 2, 2019).

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.¹¹¹

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.¹¹²

1. Produced in the United States

An eligible commodity is an agricultural commodity that is produced in the United States.¹¹³ Imported commodities, which are not used in calculating a CFAP payment, are not eligible.¹¹⁴

2. Intended to be Marketed for Commercial Production—And for Use On Farm

In general, USDA rules say an eligible commodity must be intended to be marketed for commercial production in order to be eligible for CFAP.¹¹⁵ This would seem to mean that crops intended to be fed to livestock are not eligible commodities under CFAP. It would also seem to mean that commodities raised for home consumption are not eligible commodities.

In a recent amendment to the CFAP Handbook, USDA has added significant exceptions to this rule. USDA now says that commodities intended to be used on the farm are eligible for CFAP.¹¹⁶ USDA gives as an example of a commodity that would be eligible, silage. USDA continues to say that crops intended for grazing are not eligible.

¹¹¹ CFAP Handbook, page 2-12, para. 21.A (May 29, 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").

¹¹² 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 (May 29, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020).

¹¹³ 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 29, 2020).

¹¹⁴ CFAP Rule, 85 Fed. Reg. 30825, 30830 (May 21, 2020) (to be codified at 7 C.F.R. § 9.1(a)).

¹¹⁵ 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 29, 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).

¹¹⁶ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020).

This would seem to mean that even carefully maintained forage that the farmer intends to let animals graze, is not eligible. Corn, beans, and other crops that are harvested and fed to livestock, on the other hand, would seem to be eligible. It is unclear what other crops might count as “used on the farm” according to USDA.

3. Generally, Must Be Subject to Price Risk or Be Unpriced—With Exceptions

When USDA issued its first rules for CFAP, it required that all commodities have a price risk. USDA has recently created important and confusing exceptions to this rule.

a. General Rule—Price Risk Required

As a general rule, in order to be eligible for CFAP, commodities must be subject to price risk, or be what USDA sometimes calls unpriced.¹¹⁷ When filling out a CFAP application, farmers certify that any production, sales and inventory eligible for payment “must be subject to price risk.”¹¹⁸ As noted below in this Guide, the certification of information on the CFAP application form needs to be taken seriously by farmers.

According to this general rule, as of January 15, 2020, an eligible commodity cannot have been subject to an agreed-upon future price, either through a forward contract, agreement, or similar binding document.¹¹⁹

b. New Exceptions

USDA issued a Handbook on May 29, 2020 that did not allow for any exceptions to the general rule.¹²⁰ By May 29, 2020, USDA had issued revisions to the Handbook to allow exceptions.¹²¹ In addition, on June 12, 2020, a new CFAP rule

¹¹⁷ For the general rule, see CFAP Handbook, page 3-2, para. 50.B (May 29, 2020). For the need for non-specialty crops and wool inventory to have a price risk, see CFAP Handbook, page 5-1, para. 125.B, page 5-31, para. 141.A, and page 5-51, para 151.B (May 29, 2020). For the requirement that all sales and inventory of livestock have a price risk as of January 15, 2020, see CFAP Handbook, page 6-22, para. 177.A, page 6-24, para. 178.A (May 29, 2020). For the requirement that all specialty crops have price risk that were either sold between January 15, 2020 and April 15, 2020, or that remained unharvested by April 15, 2020, see CFAP Handbook, page 8-1, para. 211.B (May 29, 2020). Handbook definitions are at CFAP Handbook, Exhibit 2, page 2, “Subject to Price Risk,” “Unpriced Inventory” (May 29, 2020). See, as well, 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?” (June 9, 2020).

¹¹⁸ CFAP Application, page 1, part A.3.

¹¹⁹ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, “Unpriced”); CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Unpriced inventory”); CFAP Handbook, Exhibit 2, page 2, “Subject to Price Risk,” “Unpriced (or Subject to Risk)” (May 29, 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?” (June 9, 2020). For examples of forward contracts for non-specialty crops and wool, see CFAP Handbook, page 5-31, para. 141.B, pages 5-33 through 5-36, para. 141.D (May 29, 2020).

¹²⁰ See generally CFAP Handbook (May 22, 2020).

¹²¹ See generally CFAP Handbook (May 29, 2020).

was published in the Federal Register that changed some of the price risk requirements for certain commodities.¹²² These exceptions are described below.

(i) Specialty Crops

The May 29, 2020 CFAP Handbook suggests that one category of specialty crops can be eligible for CFAP even if they are not subject to price risk.¹²³ This category includes specialty crops that were shipped from the farm by April 15, 2020, but later spoiled due to a loss of marketing channels.

Changes made in the rule published on June 12, 2020, expanded the exceptions to the price risk requirements for specialty crops. Under the June 12, 2020 rule, two categories of specialty crops can be eligible for CFAP even if they are not subject to price risk.¹²⁴ These are: (1) specialty crops that were harvested and shipped but later spoiled and remained unpaid due to loss of a market; and (2) specialty crops that did not leave the farm, were donated, or mature crops that remained unharvested between January 15, 2020, and April 15, 2020.¹²⁵

In other words, based on the Handbook and CFAP Rule changes, specialty crops that were not sold between January 15, 2020, and April 15, 2020 can be eligible for CFAP even if they had been subject to an agreed-upon price before January 15, 2020.

(ii) Livestock

In general, CFAP payments depend on whether livestock: (1) were sold between January 15, 2020, and April 15, 2020; or (2) remained in inventory during the period from January 16, 2020 to May 14, 2020.¹²⁶ The CFAP Handbook versions of May 22, 2020, and May 29, 2020, both made clear that all payments based on sales or inventory of livestock must be subject to price risk as of January 15, 2020.¹²⁷

A new CFAP rule published in Federal Register on June 12, 2020 seems to change the requirements for price risk as they relate to livestock.¹²⁸

¹²² See generally CFAP Rule Correction, 85 Fed. Reg. 35799 (June 12, 2020).

¹²³ CFAP Handbook, page 8-1, para. 211.B (May 29, 2020). There is one place in the May 29, 2020 Handbook where FSA states that specialty crops that are sold must *not* be subject to price risk. This appears to be an error. See CFAP Handbook, page 2-16, para. 22.A (May 29, 2020).

¹²⁴ CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)).

¹²⁵ CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)).

¹²⁶ CFAP Handbook, page 6-24, para. 178.A, page 6-45, para. 188.B (May 29, 2020).

¹²⁷ CFAP Handbook, page 6-22, para. 177.A, page 6-2, para. 165.C, “Unpriced” (May 29, 2020). USDA notes that to be unpriced, or to have price risk, means being not subject to an agreed upon price in the future, through a forward contract, agreement, or similar binding agreement as of January 15, 2020.

¹²⁸ CFAP Rule Correction, 85 Fed. Reg. 35799, 36799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5). A USDA FAQ released prior to the publication of the new rule does not reflect these changes to the price

Under the new June 12, 2020 rule, eligible livestock sales—whether of cattle, hogs and pigs, or lambs and yearlings—need to have been of unpriced livestock.¹²⁹ According to a new definition, unpriced means not subject to an agreed upon price in the future through a forward contract, agreement, or similar binding document as of January 15, 2020.¹³⁰ So, to be eligible for CFAP as livestock that were sold between January 15, 2020, and April 15, 2020, the livestock need to have been unpriced on January 15, 2020.

For inventory—that is to say livestock that were held in inventory between January 16, 2020, and May 14, 2020—it appears that as of the June 12, 2020 rule, eligible livestock do not need to have been unpriced on January 15, 2020, but they do need to have been owned by the farmer.¹³¹

In sum, even though the Handbook and other materials suggest that all livestock need to be unpriced to be eligible for payment, a June 12, 2020 Federal Register rule seems to change that policy. Older USDA sources, such as the CFAP Handbook and Notices, do not reflect this change.

(iii) Dairy

The CFAP rules for unpriced commodities do not appear to apply to dairy. USDA officials have said that this requirement does not apply to dairy. While there is no formal USDA authority for this view, it seems likely that dairy producers that have the price of their milk contracted even a few months in advance would not qualify under the general rules. It is notable, however, that specific dairy rules do not require milk to be unpriced.¹³² It would not be surprising, in other words, for USDA to make

risk requirements for livestock. See USDA, Coronavirus Food Assistance Program FAQ, “Can a producer get assistance if he/she didn’t sell calves between January and April?” (June 9, 2020).

¹²⁹ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c)(1), (d)(1), (f)(1)).

¹³⁰ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, “Unpriced”).

¹³¹ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c)(2), (d)(2), (f)(2)). The May 21, 2020 rule refers to “unpriced cattle inventory,” “unpriced hog and pig inventory” and “unpriced lambs and yearlings in inventory” as eligible. See CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(c)(2), (d)(2), (f)(2)). The June 12, 2020 rule refers to “cattle inventory owned,” “hog and pig inventory owned” and “lambs and yearlings in inventory owned.” See CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c)(2), (d)(2), (f)(2)). Further USDA removed the definition of “unpriced inventory” in the new rule and replaced it with simply “unpriced.” See CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, “Unpriced”). Finally, the prefatory remarks for the June 12, 2020 rule also note that calculations for livestock sales are based on “unpriced livestock sales,” while for inventory they apply to “livestock inventory owned” without reference to whether the inventory is unpriced.

¹³² The May 22, 2019 Handbook included a requirement that “All production, sales, and inventory of eligible commodities and livestock must be subject to price risk as of January 15, 2020.” CFAP Handbook, page 2-16, para. 22.A (May 22, 2020). However, with the Handbook amendment on May

an exception to the general rule for dairy, and allow dairy to be eligible for CFAP even if milk was not subject to price risk.

c. What to Make of the Unpriced Requirement

As noted above, general CFAP rules seem to require that all commodities be unpriced. In several cases, however, there seem to be exceptions to the general rule, although the various rules are confusing and at times appear to contradict one another. It may be that USDA has decided that for several commodities the unpriced rules simply do not apply. The danger for farmers is that the CFAP application continues to require farmers to affirm that all commodities have a price risk.

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.¹³³ USDA has created lists of commodities that are currently eligible.¹³⁴ A number of commodities raised by farmers in the United States are not included, and therefore are not eligible for CFAP.

The commodities that are now eligible for CFAP are listed and defined later in this Guide. There is also a discussion of 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 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 June 16, 2020

The following sections describe the CFAP-eligible commodities as of June 9, 2020. This list will almost certainly change.

29, 2020, this language was specifically removed. For comparison, see CFAP Handbook, page 2-16, para. 22.A (May 29, 2020). Moreover, nothing in the May 29, 2020 Handbook expressly states that dairy must be unpriced or subject to price risk. Neither does the CFAP Rule expressly require that dairy be unpriced or subject to price risk. See generally CFAP Rule, 85 Fed. Reg. 30825 (May 21, 2020).

¹³³ 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 29, 2020).

¹³⁴ See, for example, CFAP Handbook, page 2-12, para. 21.A (May 29, 2020).

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. These categories are especially important because CFAP payment rates differ depending on which category a commodity falls within.

1. Dairy

Dairy is an eligible commodity.¹³⁵ USDA appears to think of the dairy commodity as being exclusively milk, and not other commodities sold by a dairy farmer—including selling bulls or cull cows.

Eligible milk production can include milk that was commercially marketed for the months of January, February, and March 2020.¹³⁶ Milk that was dumped during the months of January, February or March 2020 is also eligible for CFAP.¹³⁷

To be eligible, the milk must be commercially marketed in the United States.¹³⁸

A farmer's participation in Dairy Margin Coverage, Dairy Revenue Protection, Livestock Gross Margin, or other dairy revenue insurance programs does not affect eligibility for CFAP.¹³⁹

¹³⁵ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 4-1, para. 85.A, page 4-31, para. 96 (May 29, 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?" (June 9, 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.

¹³⁶ CFAP Handbook, page 4-31, para. 96.B (May 29, 2020).

¹³⁷ CFAP Handbook, page 4-31, para. 96.B (May 29, 2020); USDA, Coronavirus Food Assistance Program FAQ, "If a dairy producer had to dump milk, will his/her dumped milk be covered?" (June 9, 2020).

¹³⁸ CFAP Handbook, page 4-31, para. 96.B (May 29, 2020). If a dairy operation that markets milk in the United States operates as a joint venture and does not have a tax identification number (TIN), the individual members of the dairy operation will need to apply for CFAP separately for their applicable portion of the milk production, based on their ownership level. See CFAP Handbook, page 4-31, para. 96.D (May 29, 2020). The CFAP Handbook states that FSA county offices will provide guidance and direction for joint venture dairy operations.

¹³⁹ CFAP Handbook, page 4-31, para. 96.B (May 29, 2020).

2. Wool

Wool can be an eligible commodity under CFAP.¹⁴⁰ Wool is defined as the fiber sheared from live sheep.¹⁴¹ It includes both graded and ungraded wool.¹⁴² Graded wool is to be paid on a clean basis, and ungraded wool is paid on a greasy basis.

3. Livestock

Livestock can be an eligible commodity under CFAP.¹⁴³ USDA determined the eligibility of specific livestock based on whether the livestock experienced a 5-percent-or-greater market price decline between the average for the week of January 13-17, 2020, compared to the average for the week of April 6-10, 2020.¹⁴⁴ Using this threshold, USDA has determined that several types of livestock are eligible for CFAP—namely, cattle, swine and sheep—so long as all other eligibility requirements are met.¹⁴⁵ Livestock are eligible for CFAP even if the farmer purchased livestock insurance coverage offering protection against market price declines.¹⁴⁶

The following sections outline the specific eligibility requirements for each type of livestock. Only those livestock listed below are currently eligible for CFAP.¹⁴⁷

¹⁴⁰ CFAP Rule, 85 Fed. Reg. 30825, 30825-30826 (May 21, 2020) (prefatory comments); CFAP Handbook, pages 5-1 and 5-2, para. 125 (May 29, 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.

¹⁴¹ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Wool”).

¹⁴² 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, Exhibit 2, page 2 (May 29, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹⁴³ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 6-23, para. 177.B (May 29, 2020); USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020), 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.

¹⁴⁴ CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 6-1, para. 165.B (May 29, 2020); USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020), 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.

¹⁴⁵ CFAP Handbook, page 6-23, para. 177.B (May 29, 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?” (June 9, 2020).

¹⁴⁶ CFAP Handbook, page 6-21, para. 176.B (May 29, 2020).

¹⁴⁷ CFAP Handbook, pages 6-22 and 6-23, para. 177.A-B (May 29, 2020).

a. Cattle

Cattle can be an eligible commodity under CFAP.¹⁴⁸ By cattle, USDA means commercially raised or maintained bovine animals.¹⁴⁹ For CFAP purposes, the definition of cattle does not include animals used for dairy or intended for dairy production. In addition, it does not include beefalo and bison.

USDA has divided cattle into five separate eligible commodities.¹⁵⁰ These categories matter because CFAP payments vary depending on the commodity category the livestock fall within. The following sections described those categories and some of the commonly used terms for cattle that fit within each. The five categories are: (1) Feeder Cattle Under 600 Pounds; (2) Feeder Cattle 600 Pounds or More; (3) Slaughter Cattle—Fed Cattle; (4) Slaughter Cattle—Mature Cattle; and (5) All Other Cattle.

USDA has given some guidance to help farmers figure out in which of the five categories certain types of cattle fit. That guidance is included in the sections below.

(i) Feeder Cattle Under 600 pounds

Feeder cattle that weigh less than 600 pounds are a separate eligible commodity under CFAP.¹⁵¹ All animals in this category will be eligible for the same payment rate under CFAP.

According to USDA, livestock that fall the category of Feeder Cattle Under 600 Pounds include the following.

(a) Calves

Calves in general will usually count as Feeder Cattle Under 600 pounds. It is important to note that calves that are intended to be milk cows do not count as feeder cattle.¹⁵²

USDA gives several examples of calves that fit into this category.

First, newborn calves count as Feeder Cattle Under 600 Pounds.¹⁵³

¹⁴⁸ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 6-23, para. 177.B (May 29, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹⁴⁹ 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 29, 2020).

¹⁵⁰ CFAP Handbook, page 6-23, para. 177.B (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020); USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁵¹ 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”); CFAP Handbook, page 6-2, para. 165.C, “Feeder cattle less than 600 pounds,” and page 6-23, para. 177.B (May 29, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹⁵² Cattle, in general, do not include animals intended for dairy production. CFAP Handbook, page 6-1, para. 165.C, “Cattle” (May 29, 2020).

¹⁵³ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020). There seems to be a typographical error in the USDA explanation for newborn calves.

Second, calves that are still nursing a cow fit into this category. These calves generally weigh less than 500 pounds, according to USDA.¹⁵⁴

Third, bucket calves fit into this category. USDA thinks of bucket calves as orphaned or newborn calves normally purchased when they are one to ten days old.¹⁵⁵

Fourth, weaner or weaned calves can fall within the category of Feeder Cattle Under 600 pounds.¹⁵⁶ For USDA, weaner or weaned calves are animals between 105 and 355 days coming from a cow-calf operation. The animal must weigh less than 600 pounds.

(b) Open Heifers

Open heifers can count as Feeder Cattle Under 600 Pounds. Open heifers mean nonpregnant female bovines.¹⁵⁷ The heifers must weigh less than 600 pounds.

(c) Heiferettes

Feeder Cattle Under 600 Pounds can include what USDA calls heiferettes.¹⁵⁸ A heiferette, for the purpose of CFAP, is a female bovine animal that has not calved and weighs more than 500 pounds. The category includes a heifer that is either placed on feed following the loss of a calf or is an open heifer placed on feed following the breeding season. To be in this category of feeder cattle, the heifers must weigh less than 600 pounds.

(d) Steers

Feeder Cattle Under 600 Pounds can include steers.¹⁵⁹ By steer, USDA means a castrated male animal that generally weighs more than 500 pounds. To be in this category, the animals must weigh less than 600 pounds.

(e) Backgrounded Cattle

Feeder Cattle Under 600 Pounds can include backgrounded cattle.¹⁶⁰ That means steers and heifers that are normally fed a warmup or conditioning ration and then sold as feeders or shipped to another feedlot for slaughter market. According to USDA, backgrounded animals often weigh up to 700 pounds, but to be in this category the animals must weigh less than 600 pounds.

¹⁵⁴ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁵⁵ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁵⁶ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁵⁷ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁵⁸ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁵⁹ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁶⁰ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

(f) Stockers/Feeders/Feeder Calves

Feeder Cattle Under 600 Pounds can include stockers, feeders, or feeder calves.¹⁶¹ Stockers, feeders and feeder calves are defined by USDA to mean young, weaned steers, or heifers that are usually grazing on pasture and/or feed ration in order to prepare for shipment to feeders intended for slaughter or selected for replacement stock. These animals tend to weigh from 400 to 600 pounds, but to be in this category they must weigh less than 600 pounds.

(ii) Feeder Cattle 600 Pounds or More

Feeder cattle that weigh 600 pounds or more count as a separate eligible commodity under CFAP.¹⁶² To be eligible under this category, the cattle must weigh less than cattle in the category of Slaughter Cattle-Fed Cattle.¹⁶³ All animals in this category will be eligible for the same payment rate under CFAP.

According to USDA, livestock that fall the category of Feeder Cattle 600 Pounds or More include the following.

(a) Heiferettes

Feeder Cattle 600 Pounds or More can include what USDA calls heiferettes.¹⁶⁴ A heiferette, for the purpose of CFAP, is a female bovine animal that has not calved and weighs more than 500 pounds. To be in this category, heifers must weigh 600 pounds or more. The category includes a heifer that is either placed on feed following the loss of a calf or is an open heifer placed on feed following the breeding season.

(b) Steers

Feeder Cattle 600 Pounds or More can include steers.¹⁶⁵ By steer, USDA means a castrated male animal that generally weighs more than 500 pounds. To be in this category, the animals must weigh at least 600 pounds.

¹⁶¹ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁶² CFAP Handbook, page 6-2, para. 165.C, "Feeder cattle 600 pounds or more," page 6-23, para. 177.B (May 29, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹⁶³ This means the cattle must weigh less than 1,200 pounds. See CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, "Slaughter cattle-fed cattle"); see also 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"); CFAP Handbook, page 6-2, para. 165.C, "Feeder cattle 600 pounds or more," "Slaughter cattle-fed cattle" (May 29, 2020).

¹⁶⁴ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁶⁵ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

(c) Weaner or Weaned Calves

Weaner calves and weaned calves can count as Feeder Cattle 600 Pounds or More.¹⁶⁶ For USDA, this means animals between 105 and 355 days old that come from a cow-calf operation. The animal must weigh 600 pounds or more.

(d) Backgrounded Cattle

Feeder Cattle 600 Pounds or More can include backgrounded cattle.¹⁶⁷ That means steers and heifers that are normally fed a warmup or conditioning ration and then sold as feeders or shipped to another feedlot for slaughter market. According to USDA, backgrounded animals often weigh up to 700 pounds, but to be in this category the animals must weigh at least 600 pounds.

(e) Stockers/Feeders/Feeder Calves

Feeder Cattle 600 Pounds or More can include stockers, feeders, or feeder calves.¹⁶⁸ Stockers, feeders and feeder calves are defined by USDA to mean young, weaned steers, or heifers that are usually grazing on pasture and/or feed ration in order to prepare for shipment to feeders intended for slaughter or selected for replacement stock. These animals tend to weigh from 400 to 800 pounds. To be in this category, they must weigh at least 600 pounds.

(f) Yearlings

Feeder Cattle 600 Pounds or More can include yearlings.¹⁶⁹ By yearlings, USDA means calves between one and two years of age.

(g) Open Heifers

Open heifers can count as Feeder Cattle 600 Pounds or More. Open heifers are nonpregnant female bovines.¹⁷⁰ The heifers must weigh at least 600 pounds.

¹⁶⁶ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁶⁷ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁶⁸ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁶⁹ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁷⁰ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

(iii) Slaughter Cattle—Fed Cattle

USDA considers Slaughter Cattle—Fed Cattle to be an eligible commodity.¹⁷¹ For this category, USDA means cattle that weigh 1,200 pounds or more and which are intended for slaughter.¹⁷²

According to USDA, livestock that fall within the category of Slaughter Cattle—Fed Cattle, include the following.

(a) Finished Cattle—1200 Pounds or More

The category of Slaughter Cattle—Fed Cattle includes finished cattle that weigh 1200 pounds or more.¹⁷³ By USDA's definition, these are cattle that have reached their optimal weight and conditions and are ready for slaughter.

(b) Fat Steers and Heifers

The category of Slaughter Cattle—Fed Cattle includes fat steers and heifers that weigh 1200 pounds or more.¹⁷⁴ By USDA's definition, these are steers and heifers that have reached their optimal weight and conditions and are ready for slaughter.

(iv) Slaughter Cattle—Mature Cattle

Culled cattle that were raised or maintained for breeding purposes and then removed from inventory and are intended for slaughter are counted as a separate eligible commodity called Slaughter Cattle-Mature Cattle.¹⁷⁵

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.¹⁷⁶

¹⁷¹ 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," page 6-23, para. 177.B (May 29, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020). 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).

¹⁷² CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, "Slaughter cattle—fed cattle"). Previously, the rule defined Slaughter Cattle-Fed Cattle as being cattle intended for slaughter that had an average weight of 1400 pounds, although the weight could range from 1200 to 1600 pounds. The cattle had to have an average carcass weight of at 800 pounds. See CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Slaughter cattle—fed cattle").

¹⁷³ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁷⁴ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁷⁵ 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," "Cattle raised or maintained for breeding purposes," page 6-23, para. 177.B (May 29, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹⁷⁶ 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"); CFAP Handbook, page 6-2, para. 165.C, "Cattle raised or

According to USDA, livestock that fall within the category of Slaughter Cattle—Mature Cattle can include the following.

(a) Open Cows—Slaughter

The category of Slaughter Cattle-Mature Cattle includes open cows.¹⁷⁷ These are non-pregnant cows at the end of the breeding season that are destined for slaughter and not retained in the herd..

(b) Beef and Dairy Culled Cows

The category of Slaughter Cattle-Mature Cattle includes beef and dairy cows that have been removed from the main breeding herd or from dairy production.¹⁷⁸ They are then usually sold for slaughter and are not to be used as replacements. USDA notes that examples of the reasons for a beef or dairy cow to be culled include age, poor production, physical ailments, poor disposition, or genetic selection.

(c) Beef and Dairy Culled Herd Bulls

The category of Slaughter Cattle-Mature Cattle includes mature, uncastrated male bovines have been removed from the main breeding herd.¹⁷⁹ They are generally sold for slaughter and not to be used as replacements. Mature herd bulls are approximately twenty-four months of age or older. They can be either beef or dairy bulls.

(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.¹⁸⁰ USDA defines this category to mean commercially raised or maintained bovine animals that do not fall within the other four cattle commodity categories listed above.¹⁸¹

Beefalo and bison are not included in this category and are not eligible as cattle for purposes of CFAP.¹⁸²

maintained for breeding purposes” (May 29, 2020); USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁷⁷ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁷⁸ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁷⁹ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁸⁰ CFAP Handbook, page 6-23, para. 177.B (May 29, 2020); CFAP Handbook, page 6-1, para. 165.C, “All other cattle,” page 6-23, para. 177.B (May 29, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹⁸¹ 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 29, 2020).

¹⁸² 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 29, 2020).

Similarly, animals used for dairy production or intended for dairy production do not fall within this category and are not considered All Other Cattle for CFAP purposes.¹⁸³ As noted above, there is a separate category for culled dairy animals. If dairy animals are no longer used for dairy production and have entered the beef cattle market, they can be eligible for CFAP under the category of Slaughter Cattle-Mature Cattle.¹⁸⁴

According to USDA, livestock that fall within the category of All Other Cattle include the following.

(a) Replacement Beef Heifers

The category of All Other Cattle includes replacement heifers, meaning heifers that have been selected to be bred and placed in a beef herd.¹⁸⁵ Although dairy farms have replacement heifers, heifers intended for milking are not eligible as All Other Cattle.

(b) Bred Heifers

The category of All Other Cattle includes bred heifers.¹⁸⁶ Bred heifers are female bovine that are pregnant with a first calf. This category seems not to include bred dairy heifers.

(c) First Calf Heifers

The category of All Other Cattle includes what USDA calls first calf heifers.¹⁸⁷ By first calf heifers, USDA means young animals that have had only one calf. This category seems not to include dairy animals.

(d) Bred Cows

The category of All Other Cattle includes bred cows. USDA's definition of a bred cow is a female bovine that has borne at least one calf.¹⁸⁸ USDA may have meant to include in the definition that the animal is pregnant. This category seems not to include dairy animals.

¹⁸³ 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," "All Other cattle" page 6-22, para. 177.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 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).

¹⁸⁴ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁸⁵ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁸⁶ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁸⁷ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁸⁸ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

(e) Open Cows—Retained in Herd

The category of All Other Cattle includes open cows. This means cows that at the end of the breeding season are not pregnant, but that are kept in the herd.¹⁸⁹ This category seems not to include dairy animals.

(f) Herd Bulls—Breeding and Beef Only

The category of All Other Cattle includes herd bulls. These are mature, uncastrated male bovines used for breeding purposes.¹⁹⁰ By USDA's definition, herd bulls are approximately twenty-four months of age or older. Herd bulls only include beef bulls.¹⁹¹

b. Swine—Hogs and Pigs

Swine—specifically hogs and pigs—can be eligible commodities for CFAP.¹⁹² For this purpose, hogs are defined as weighing 120 pounds or more.¹⁹³ Pigs are defined as weighing less than 120 pounds.¹⁹⁴

c. Sheep—Lambs and Yearlings Only

Sheep can be an eligible commodity for CFAP. USDA has decided, however, that only lambs and yearlings are eligible for CFAP.¹⁹⁵ By lambs and yearlings, USDA means all sheep less than two years old.¹⁹⁶

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.¹⁹⁷ Because

¹⁸⁹ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁹⁰ USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020). 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. 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"); CFAP Handbook, page 6-2, para. 165.C, "Cattle raised or maintained for breeding purposes" (May 29, 2020).

¹⁹¹ 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.A (May 29, 2020); USDA, Livestock and the Coronavirus Food Assistance Program (June 8, 2020).

¹⁹² CFAP Handbook, page 6-23, para. 177.B (May 29, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

¹⁹³ 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 29, 2020).

¹⁹⁴ 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 29, 2020).

¹⁹⁵ CFAP Handbook, page 6-23, para. 177.B (May 29, 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?" (June 9, 2020).

¹⁹⁶ 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 29, 2020).

¹⁹⁷ USDA, Coronavirus Food Assistance Program FAQ, "What commodities are not eligible for CFAP?" (June 9, 2020).

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.¹⁹⁸

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 crops. The following sections describe in more detail how USDA determines the eligibility of specific crops, including which crops fall into each of these categories.

a. Non-Specialty Crops

Non-specialty crops can be eligible commodities for CFAP.¹⁹⁹ The following rules apply.

(i) How USDA Decides Eligibility for Non-Specialty Crops

USDA determined the eligibility of non-specialty crops by comparing the decline in the weekly average of the crop's futures prices between the average for the week of January 13-17, 2020 and the average for the week of April 6-9, 2020.²⁰⁰ If the decline in the futures prices was 5 percent or greater, then USDA made the non-specialty crop eligible for CFAP.

(ii) More Crops Could be Added

USDA may add more non-specialty crops to this list of eligible crops.²⁰¹ The way that can happen is discussed later in this Guide.

(iii) Eligibility Based on Type and Intended Use

USDA has published a fair bit about how CFAP is to work, and it has listed the various eligible commodities on its website. Eligibility is made confusing, however, because the CFAP Handbook limits the availability of

¹⁹⁸ 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 29, 2020).

¹⁹⁹ 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 29, 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?" (June 9, 2020); USDA, Non-Specialty Crops and Coronavirus Food Assistance Program (June 8, 2020), 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.

²⁰⁰ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 5-1, para. 125.B (May 29, 2020). If futures prices are not available for the crop, USDA says it used the weekly average of the cash prices.

²⁰¹ 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 29, 2020).

CFAP to non-specialty crops by both their type and their intended use.²⁰² The Handbook is the only place that references specific types and intended uses of eligible non-specialty crops.²⁰³ It is unclear the extent to which the eligibility rules for a crop's type and intended use will be vigorously enforced by USDA, but the rules are a part of the Handbook which governs CFAP.

(iv) Intended Uses for Non-Specialty Crops

According to the CFAP Handbook, for some non-specialty crops only certain intended uses of the crop are eligible for CFAP.²⁰⁴ Intended use means the end use for which the crop or commodity was grown and produced.²⁰⁵

The CFAP Handbook lists six types of uses that are allowed for CFAP non-specialty crops.²⁰⁶ Not every intended use is allowed for each non-specialty crop. The six types of uses are defined in the sections that follow.

(a) Forage

For some non-specialty crops, the intended use can be forage.²⁰⁷ That means the crop is intended to be harvested as feed for livestock. This does not include crops grown with the intended use of grazing by livestock, or the intended use of feeding the grain to livestock. As noted below, crops intended for grazing are not eligible for CFAP.²⁰⁸

(b) Fresh

An acceptable intended use for some non-specialty crops is what FSA calls "fresh."²⁰⁹ This means the crop is intended to have an end use that does not require changes in the crop. In other words, the crop is not altered by freezing, canning, pickling, salting, and so forth.

²⁰² CFAP Handbook, page 5-22, para. 137.A (May 29, 2020).

²⁰³ Neither the CFAP Rule, the USDA website, nor the CFAP Application itself limit eligibility of crops based on their type or intended use.

²⁰⁴ For these restrictions see CFAP Handbook, page 5-22, para. 137.A (May 29, 2020). Codes for intended use can be found at FSA Handbook, Acreage and Compliance Determinations, 2-CP (Revision 16), Exhibit 11.E, pages 6-8 (March 16, 2020), at: https://www.fsa.usda.gov/Internet/FSA_File/2-cp_r16_a12.pdf.

²⁰⁵ See 7 C.F.R. § 718.2, "Intended use" (2020).

²⁰⁶ Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²⁰⁷ Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²⁰⁸ 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 5-22, para. 137.A (May 29, 2020); USDA, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (June 8, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crops (May 2020).

²⁰⁹ Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

(c) Grain

For some non-specialty crops, grain can be an intended use.²¹⁰ This means that the crop is intended to be harvested as small hard seed such as corn, rye, oats, millet, or wheat.

(d) Processed

For some non-specialty crops, the crop can be intended to be processed.²¹¹ This means that the crop is intended to have an end use after it undergoes a process that changes the original properties of the crop, such as by freezing, drying, canning, salting, and so forth.

(e) Seed

For some non-specialty crops, the seed can be an eligible intended use.²¹² A crop with an intended use of seed means the harvest of the seed is to be used for growing a new crop, and not for livestock or human consumption.

(f) Silage

For some non-specialty crops, silage is an acceptable intended use.²¹³ This means that the crop is intended to be preserved through fermentation and then fed to livestock.

(v) Crops Intended for Grazing Not Eligible

As a general rule, crops intended for grazing are not eligible as non-specialty crops.²¹⁴ So, if a farmer raised one of the eligible non-specialty crops, listed below, and intended from the beginning to use the crops 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.

(vi) Eligible Non-Specialty Crops—as of June 9, 2020

The following are eligible non-specialty crops for CFAP. As described above, for some crops the CFAP Handbook states that only certain types

²¹⁰ Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²¹¹ Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²¹² Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²¹³ Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²¹⁴ 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 5-22, para. 137.A (May 29, 2020); USDA, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (June 8, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crops (May 2020). 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).

and intended uses of the crop are eligible. These eligible types and intended uses are included in the descriptions below.²¹⁵

(a) Malting Barley

According to the Handbook, all types of barley are eligible for CFAP.²¹⁶ The rules for barley, however, make it unclear exactly what counts as eligible barley. For example, the Handbook says that only barley delivered as malting barley is eligible. The Handbook also says that the only allowable intended uses for barley include forage, grain, and seed.

(b) Canola

All types of canola can be eligible for CFAP.²¹⁷ The canola must be intended to be used for seed, grain, or processed.

(c) Corn

A variety of types of corn can be eligible for CFAP.²¹⁸ They are: (1) amylose; (2) blue; (3) grainless forage; (4) high amylase; (5) popcorn; (6) red; (7) strawberry popcorn; (8) tropical; (9) waxy; (10) white; and (11) yellow. To be eligible, corn must be intended for fresh, grain, processed, seed, or silage uses.

(d) Upland Cotton

Upland cotton is eligible for CFAP.²¹⁹ It is not clear from the Handbook if there are any limits on the type or intended uses for the upland cotton.

(e) Millet

All types of millet are eligible for CFAP.²²⁰ The intended use must be forage, grain, or seed.

²¹⁵ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²¹⁶ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020). USDA notes that most barley grown for malting is produced under contract. Farmers will be required to certify the amount under contract if that is the case. CFAP Handbook, page 5-22, para. 137.A (May 29, 2020).

²¹⁷ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²¹⁸ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²¹⁹ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²²⁰ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

(f) Oats

All types of oats are eligible for CFAP.²²¹ The intended use must be forage, grain, or seed.

(g) Sorghum

All types of sorghum are eligible for CFAP.²²² In general, the intended use of sorghum must be forage, grain, seed, or silage. If, however, the crop is forage sorghum, the intended use must be forage, processing, seed, or silage. If the crop is a dual purposes sorghum, the use must be forage, grain, seed, or silage.

(h) Soybeans

All types of soybeans are eligible for CFAP.²²³ The intended use must be forage, fresh, grain, seed, or processing.

(i) Sunflowers

All types of sunflowers are eligible for CFAP.²²⁴ Any intended use is eligible as well.

(j) Wheat and Durum Wheat

Hard red spring wheat is eligible for CFAP.²²⁵ In addition, durum wheat is eligible for CFAP. The type must be winter hard amber durum or spring hard amber durum. The intended uses for these wheats must be forage, grain, or seed.

²²¹ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²²² CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²²³ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²²⁴ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²²⁵ CFAP Handbook, page 5-22, para. 137.A (May 29, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

b. Specialty Crops

USDA has decided that only certain specialty crops are eligible for CFAP.²²⁶ For some of these crops, only specific types of the non-specialty crops are eligible. In addition, for some crops only certain intended uses of the crops are eligible.²²⁷

(i) How USDA Decides Eligibility of Specialty Crops

To decide the eligibility of specific specialty crops, USDA compared the reduction in a crop's sales price between the average for the week of January 13-17, 2020, and the average for the week of April 6-10, 2020.²²⁸ If the reduction was 5 percent or greater, according to USDA, then USDA made the crop eligible for CFAP.

(ii) More Specialty Crops Could be Added

USDA may add more specialty crops to the list of eligible crops.²²⁹ The way that can happen is discussed later in this Guide.

(iii) Eligibility Based on Type and Intended Use

USDA has published a fair bit about how CFAP is to work, and it has listed the various eligible commodities on its website. Eligibility is made confusing, however, because the CFAP Handbook limits the availability of CFAP to specialty crops by both their type and their intended use.²³⁰ The Handbook is the only place that references specific types and intended uses of eligible specialty crops.²³¹ It is unclear the extent to which the eligibility rules for a crop's type and intended use will be vigorously enforced by USDA, but the rules are a part of the Handbook which governs CFAP.

²²⁶ CFAP Handbook, page 8-21, para. 4.A (May 29, 2020); 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.

²²⁷ For these restrictions see CFAP Handbook, page 5-22, para. 137.A (May 29, 2020). Codes for intended use can be found at FSA Handbook Acreage and Compliance Determinations, 2-CP (Revision 16), exhibit 11.E, pages 6-8 (March 16, 2020), at https://www.fsa.usda.gov/Internet/FSF_File/2-cp_r16_a12.pdf.

²²⁸ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments).

²²⁹ 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 29, 2020).

²³⁰ CFAP Handbook, pages 8-21 and 8-22, para. 221.A-B (May 29, 2020).

²³¹ Neither the CFAP Rule, the USDA website, nor the CFAP Application itself limit eligibility of crops based on their type or intended use.

(iv) Intended Uses of Specialty Crops

According to the CFAP Handbook, there are three main types of intended uses that are allowed for eligible specialty crops.²³² Intended use means the end use for which the crop or commodity was grown and produced.²³³

Not every intended use is allowed for each eligible specialty crop.

(a) Fresh

An acceptable intended use for some specialty crops is what FSA calls “fresh.”²³⁴ This means the crop is intended to have an end use that does not require changes in the crop. In other words, the crop is not altered by freezing, canning, pickling, salting, and so forth.

(b) Processed

For some specialty crops, the crop can be intended to be processed.²³⁵ This means that it is intended to have an end use after undergoing some process that changes the original properties of the crop, such as through freezing, drying, canning, salting, and so forth.

(c) Juice

An acceptable intended use for some specialty crops is juice.²³⁶ This means that the intention of growing the crop is to harvest the natural fluid, fluid content, or liquid in the crop.

(d) Other Uses Could be Added

As present, these are the only intended uses of specialty crops that are eligible for CFAP.²³⁷ That could change if USDA adds crops.

²³² Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

²³³ See 7 C.F.R. § 718.2, “Intended use” (2020).

²³⁴ Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020); CFAP Handbook, pages 8-21 and 8-22, para. 221.B (May 29, 2020).

²³⁵ Acreage and Compliance Determinations Handbook, exhibit 11.E, pages 6-8 (March 16, 2020); CFAP Handbook, pages 8-21 and 8-22, para. 221.B (May 29, 2020).

²³⁶ Acreage and Compliance Determinations Handbook, exhibit 11.E, pages 6-8 (March 16, 2020); CFAP Handbook, pages 8-21 and 8-22, para. 221.B (May 29, 2020). For at least some purposes, beginning in 2017, USDA decides not to use juice as an intended use. Instead, the intended use for crops that would have been juice was to be listed as processed. The CFAP rules appear to be a change in this decision.

²³⁷ Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020); CFAP Handbook, pages 8-21 and 8-22, para. 221.B (May 29, 2020).

(v) Crops Intended for Grazing Not Allowed

Crops intended for grazing are not eligible as non-specialty crops.²³⁸ So, if a farmer raised one of the 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.

(vi) Eligible Specialty Crops—As of June 9, 2020

The following list shows the specialty crops that USDA has decided are eligible for CFAP as of June 9, 2020.²³⁹ As described above, for some crops the CFAP Handbook states that only certain types and intended uses of the crop are eligible. These eligible types and intended uses are included in the descriptions below. A chart of all of the eligible specialty crops, as well as their allowed types and uses, can be found in the CFAP Handbook.²⁴⁰

(a) Almonds

Almonds are eligible as a specialty crop for CFAP. It is not clear if all types of almonds are eligible. It is also not clear if there are any restrictions based on the intended use of the almonds.

(b) Apples

All types of apples are eligible for CFAP as a specialty crop. The intended use for the apples must be fresh, juice, or processed.

(c) Artichokes

Artichokes are eligible as a specialty crop for CFAP. It is not clear if all types of artichokes are eligible. The intended use of the artichokes must be fresh or processed.

²³⁸ 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 5-22, para. 137.A (May 29, 2020); USDA, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (June 8, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crops (May 2020). 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).

²³⁹ CFAP Handbook, page 2-12, para. 21.A, pages 8-21 and 8-22, para. 221.B (May 29, 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?” (June 9, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Specialty crops”).

²⁴⁰ CFAP Handbook, pages 8-21 and 8-22, para. 221.B (May 29, 2020). See also Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

(d) Asparagus

Asparagus is eligible as a specialty crop for CFAP. It is not clear if all types of asparagus are eligible. The intended use of the asparagus must be fresh or processed.

(e) Avocados

Avocados are eligible as a specialty crop for CFAP. It is not clear if all types of avocados are eligible. The intended use of the avocados must be fresh or processed.

(f) Beans

Beans are eligible as a specialty crop for CFAP. All fava beans are eligible. It appears that other types of beans are not eligible for CFAP. The intended use of the beans must be fresh or processed.

(g) Blueberries

Blueberries are eligible as a specialty crop for CFAP. All types of blueberries are eligible. The intended use of the blueberries must be fresh or processed.

(h) Broccoli

Broccoli is eligible as a specialty crop for CFAP. It is not clear if all types of broccoli are eligible specialty crops. The intended use for the broccoli must be fresh or processed.

(i) Cabbage

Cabbage is eligible as a specialty crop for CFAP. All types of cabbage are eligible. The intended use of the cabbage must be fresh or processed.

(j) Cantaloupe

Cantaloupe is eligible as a specialty crop for CFAP. It is not clear if all types of cantaloupe are eligible specialty crops. The intended use of the cantaloupe must be fresh.

(k) Carrots

Carrots are eligible as a specialty crop for CFAP. All types of carrots are eligible. The intended use for the carrots must be fresh or processed.

(l) Cauliflower

Cauliflower is eligible as a specialty crop for CFAP. It is not clear if all types of cauliflower are eligible. The intended use for the cauliflower must be fresh or processed.

(m) Celery

Celery is eligible as a specialty crop for CFAP. It is not clear if all types of celery are eligible. The intended use for the celery must be fresh or processed.

(n) Cucumbers

Cucumbers are eligible as a specialty crop for CFAP. All types of cucumbers are eligible. The intended use for the cucumbers must be fresh or processed.

(o) Eggplant

Eggplant is eligible as a specialty crop for CFAP. All types of eggplant are eligible. The intended use for the eggplant must be fresh or processed.

(p) Garlic

Garlic is eligible as a specialty crop for CFAP. All types of garlic are eligible. The intended use for the garlic must be fresh or processed.

(q) Grapefruit

Grapefruit is eligible as a specialty crop for CFAP. All types of grapefruit are eligible. The intended use for the grapefruit must be fresh, juice, or processed.

(r) Kiwifruit

Kiwifruit is eligible as a specialty crop for CFAP. It is not clear if all types of kiwifruit are eligible specialty crops. The intended use for the kiwifruit must be fresh or processed.

(s) Lemons

Lemons are eligible as a specialty crop for CFAP. It is not clear if all types of lemons are eligible specialty crops. The intended use for the lemons must be fresh or processed.

(t) Iceberg Lettuce

Iceberg lettuce is eligible as a specialty crop for CFAP. The type of iceberg lettuce must be crisphead. The intended use of the iceberg lettuce must be fresh.

(u) Romaine Lettuce

Romaine lettuce is eligible as a specialty crop for CFAP. The type of lettuce must be romaine. The intended use of the romaine lettuce must be fresh.

(v) Mushrooms

Mushrooms are eligible as a specialty crop for CFAP. All types of mushrooms are eligible. The intended use for the mushrooms must be fresh or processed.

(w) Dry Onions

Dry Onions are eligible as a specialty crop for CFAP. All onions except green onions fit into this category. The intended use for the dry onions must be fresh or processed.

(x) Green Onions

Green onions are eligible as a specialty crop for CFAP. All green onions fit into this category. The intended use for the green onions must be fresh or processed.

(y) Oranges

Oranges are eligible as a specialty crop for CFAP. All types of oranges are eligible. They intended use for the oranges must be fresh, juice, or processed.

(z) Papaya

Papaya is eligible as a specialty crop for CFAP. All types of papaya are eligible. The intended use for the papaya must be fresh or processed.

(aa) Peaches

Peaches are eligible as a specialty crop for CFAP. All types of peaches are eligible. The intended use for the peaches must be fresh or processed.

(bb) Pears

Pears are eligible as a specialty crop for CFAP. All types of pears are eligible. The intended use for the pears must be fresh, juice, or processed.

(cc) Pecans

Pecans are eligible as a specialty crop for CFAP. All types of pecans are eligible. It is not clear if there are any intended use limits for pecan eligibility.

(dd) Bell Peppers—Green Only

Bell peppers are eligible as a specialty crop for CFAP. Only green bell peppers are eligible in this category. The intended use for the green bell peppers must be fresh or processed.

(ee) Peppers—Not Green Bell Peppers

Peppers are eligible as a specialty crop for CFAP. All peppers, except green bell peppers, are eligible in this category. The intended use for the peppers must be fresh or processed.

(ff) Potatoes

Potatoes are eligible as a specialty crop for CFAP. All types of potatoes are eligible. The intended use for the potatoes must be fresh or processed.

(gg) Raspberries and Caneberries

Raspberries and caneberries are eligible as a specialty crop for CFAP. The type must be either black or red. It is not clear if there are any intended use restrictions for these berries.

(hh) Rhubarb

Rhubarb is eligible as a specialty crop for CFAP. It is not clear if there are any restrictions on the type of rhubarb. The intended use for the rhubarb must be fresh or processed.

(ii) Spinach Greens

Spinach greens are eligible as a specialty crop for CFAP. The types of spinach greens that are eligible are Chinese, leaf, vine, and water. The intended use for the spinach greens must be fresh or processed.

(jj) Squash

Squash is eligible as a specialty crop for CFAP. All types of squash are eligible. The intended use for the squash must be fresh or processed.

(kk) Strawberries

Strawberries are eligible as a specialty crop for CFAP. It is not clear if there are any restrictions the type of eligible strawberries. The intended use for the strawberries must be fresh or processed.

(ll) Sweet Corn

Sweet corn is eligible as a specialty crop for CFAP. Several types of sweet corn are eligible. They are: (1) bicolor; (2) white; (3)

yellow/golden early; and (4) yellow/golden/late. The intended use for the sweet corn must be fresh or processed.

(mm) Sweet Potatoes

Sweet potatoes are eligible as a specialty crop for CFAP. All types of sweet potatoes are eligible. The intended use for the sweet potatoes must be fresh or processed.

(nn) Tangerines

Tangerines are eligible as a specialty crop for CFAP. All types of tangerines are eligible. The intended use for the tangerines must be fresh, juice, or processed.

(oo) Taro

Taro is eligible as a specialty crop for CFAP. All types of taro are eligible. The intended use for the taro must be fresh or processed.

(pp) Tomatoes

Tomatoes are eligible as a specialty crop for CFAP. All types of tomatoes are eligible. The intended use for the tomatoes must be fresh or processed.

(qq) Walnuts

Walnuts are eligible as a specialty crop for CFAP. All types of walnuts are eligible. It is not clear if there are any restrictions on the intended use for walnuts.

(rr) Watermelon

Watermelon is eligible as a specialty crop for CFAP. All types of watermelon are eligible. The intended use for the watermelon must be fresh.

c. Value-Loss Crops

At present, no value-loss crops are eligible for CFAP. USDA appears to believe some value-loss crops will become eligible commodities.²⁴¹

According to the CFAP Handbook, value-loss crops are commodities that do not lend themselves to production-based situations.²⁴² This definition is not especially helpful.

²⁴¹ See CFAP Handbook, page 7-1, para. 200 (May 29, 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.

²⁴² See CFAP Handbook, page 7-1, para. 200.A (May 29, 2020). This definition is similar to the definition of value-loss crops that is used in other programs. See, for example, FSA Handbook, Noninsured Crop

The term value-loss crop tends to get used when the whole plant is the commodity, as opposed to just a part that is harvested from the plant. In other programs, USDA has included as value-loss crops, among other things: (1) aquaculture; (2) Christmas trees; (3) floriculture; (4) ginseng root; (5) mushroom; (6) ornamental nursery; and (7) turfgrass sod.²⁴³

USDA says that for CFAP, the eligibility of specific value-loss crops will be identified in the future.²⁴⁴ To date, USDA has expressed its intention to add aquaculture and nursery crops, including cut flowers, 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. USDA posted a number of commodities on their website that it has concluded are not eligible. As of June 16, 2020, 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.²⁴⁵ It also appears that poultry are not now eligible.²⁴⁶ 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.

Disaster Assistance Program for 2015 and Subsequent years, 1-NAP (Revision 2, Amendment 16), pages 12-221 to 12-267, paras. 900-908, Exhibit 2, page 23, "Value Loss Crop" (December 17, 2019).

²⁴³ See FSA Handbook 1-NAP, pages 12-221, para. 900.A (December 17, 2019); see also FSA Handbook, Wildfires and Hurricanes Indemnity Program Plus, 2-WHIP, page 8-1, para. 160.A (March 26, 2020) (noting that value-loss crops include Christmas trees, crustaceans, flowers, mushrooms, ornamental nursery, tropical fish, and turfgrass sod).

²⁴⁴ FSA Handbook, page 7-1, para. 200.B (May 29, 2020).

²⁴⁵ 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>.

²⁴⁶ 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 CFAP Handbook, page 6-22, para. 177.A (May 29, 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.²⁴⁷

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.²⁴⁸

USDA believes the CCC Charter Act authorizes 6.5 billion dollars to compensate farmers for “losses due to on-going market disruptions.”²⁴⁹ 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.”²⁵⁰

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.²⁵¹

²⁴⁷ 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.

²⁴⁸ 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?” (June 9, 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 29, 2020). For the CARES Act language, see CARES Act (Division B, Title I).

²⁴⁹ USDA, Coronavirus Food Assistance Program, “Background on CFAP” (May 26, 2020); see also 15 U.S.C. §§ 714b, 714d, 714e.

²⁵⁰ 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?” (June 9, 2020).

²⁵¹ USDA, Coronavirus Food Assistance Program FAQ, “What commodities are not eligible for CFAP?” (June 9, 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.”²⁵² 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.”²⁵³ 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”²⁵⁴ 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-19.²⁵⁵

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 from mid-January to mid-April 2020 are not eligible for CFAP.²⁵⁶ For

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

²⁵² 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?” (June 9, 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).

²⁵³ NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

²⁵⁴ 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.

²⁵⁵ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

²⁵⁶ 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?” (June 9, 2020).

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.”²⁵⁷

(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.²⁵⁸ 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 2020.²⁵⁹

USDA has published what is called a Notice of Funding Availability (NOFA), an announcement designed to request additional information about commodities

²⁵⁷ 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?” (June 9, 2020).

²⁵⁸ 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?” (June 9, 2020).

²⁵⁹ 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?” (June 9, 2020).

that could be added to the eligible commodity list in the future.²⁶⁰ 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.”²⁶¹

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

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.²⁶² Nursery products, including cut flowers, and aquaculture products fall into this category.²⁶³ USDA has also recently said it is interested in collecting more information on certain categories of specialty crops.²⁶⁴

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.²⁶⁵

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.²⁶⁶

²⁶⁰ 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).

²⁶¹ 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?” (June 9, 2020).

²⁶² NOFA, 85 Fed. Reg. 31062, 31063-31064 (May 22, 2020).

²⁶³ 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).

²⁶⁴ USDA, Notice of Funding Availability; Coronavirus Food Assistance Program (CFAP) Additional Commodities Request for Information; Correction (NOFA Correction), 85 Fed. Reg. 35812, 35812 (June 12, 2020).

²⁶⁵ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

²⁶⁶ USDA, Coronavirus Food Assistance Program FAQ, “What commodities are not Eligible for CFAP?” (June 9, 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,²⁶⁷ as well as through a Notice of Funding Availability (NOFA), which was published in the Federal Register on May 22, 2020.²⁶⁸ USDA published a second NOFA on June 12, 2020, which adds a few additional details and makes small corrections to the original NOFA.²⁶⁹ USDA says it may use the information and comments provided to determine whether additional commodities should become eligible for CFAP.²⁷⁰

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.²⁷¹ 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.²⁷² This documentation could include information on futures prices, sales trends, market trends, or food price indexes.²⁷³

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, 2020.²⁷⁴ 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-19.²⁷⁵ As described above, it is not clear if both the price loss and increased

²⁶⁷ 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?" (June 9, 2020).

²⁶⁸ NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

²⁶⁹ NOFA Correction, 85 Fed. Reg. 35812, 35812 (June 12, 2020).

²⁷⁰ NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

²⁷¹ See generally NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

²⁷² NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

²⁷³ FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020).

²⁷⁴ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

²⁷⁵ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020); USDA, Coronavirus Food Assistance Program, "Ineligible Commodities and Request for Additional Commodities" (May 26, 2020).

marketing costs must be true in order for USDA to add a commodity to the list of CFAP-eligible commodities.²⁷⁶

USDA suggests that anyone providing comments consider three questions.²⁷⁷ 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?²⁷⁸ 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?²⁷⁹

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.²⁸⁰

Although farmers can submit information on any commodity, USDA says it is especially interested in information on certain specialty crops, nursery products (including cut flowers), and aquaculture products.²⁸¹ 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.

²⁷⁶ 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 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).

²⁷⁷ 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."

²⁷⁸ 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).

²⁷⁹ 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).

²⁸⁰ 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.

²⁸¹ 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). In the more recent correction to the original NOFA, USDA expressed interest in also gathering more information on certain specialty crops. See NOFA Correction, 85 Fed. Reg. 35812, 35812 (June 12, 2020).

(i) Some Specialty Crops

Although certain specialty crops are already eligible for CFAP, USDA says it is especially interested in gathering information on other specialty crops that might meet the requirements for gaining eligibility in the future.²⁸²

USDA would like information on only two categories of specialty crops: (1) crops that were shipped from the farm by April 15, 2020, but later spoiled or remained unpaid due to a loss of marketing channels; and (2) mature crops that remained unharvested or specialty crops that did not leave the farm between January 15, 2020, and April 15, 2020, and which have not and will not be sold.²⁸³

For specialty crops that were shipped from the farm by April 15, 2020, but later spoiled or remained unpaid due to a loss of marketing channels, USDA would like to know the quantity and price of the crops that left the farm.²⁸⁴ USDA is only interested in this information if the farmer did not have federal crop insurance or Noninsured Crop Disaster Assistance (NAP) coverage for the loss.

For mature crops that remained unharvested or specialty crops that did not leave the farm by April 15, 2020, and which will not be sold because of a lack of market, USDA would like to know the quantity and price of the crops that are ready for sale.²⁸⁵

(ii) 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.²⁸⁶

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, 2020.²⁸⁷ 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?²⁸⁸ This should

²⁸² NOFA Correction, 85 Fed. Reg. 35812, 35812 (June 12, 2020).

²⁸³ NOFA Correction, 85 Fed. Reg. 35812, 35812 (June 12, 2020).

²⁸⁴ NOFA Correction, 85 Fed. Reg. 35812, 35812 (June 12, 2020).

²⁸⁵ NOFA Correction, 85 Fed. Reg. 35812, 35812 (June 12, 2020).

²⁸⁶ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30825 (May 21, 2020) (prefatory comments).

²⁸⁷ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

²⁸⁸ A date close to this period can also be used. See NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

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?²⁸⁹ Finally, how many plants did the farmer sell between January 15, 2020 and April 15, 2020?²⁹⁰

USDA is also interested in two other types of information from nurseries.²⁹¹ 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.

(iii) Aquaculture

USDA believes that at least some aquaculture production should be eligible for CFAP.²⁹² An eligible aquaculture producer for CFAP would mean a privately-owned aquaculture business that propagates freshwater and saltwater products in controlled environments.²⁹³

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.²⁹⁴ 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.²⁹⁵ First, what is the average price received per product for the week of January 15, 2020 through January 17, 2020?²⁹⁶ Second, what was the average price received per product sold the week of April 6, 2020 through April 10, 2020?²⁹⁷ 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,

²⁸⁹ A date close to this period can also be used. See NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

²⁹⁰ NOFA, 85 Fed. Reg. 31062, 31063 (May 22, 2020).

²⁹¹ NOFA, 85 Fed. Reg. 31062, 31063-31064 (May 22, 2020).

²⁹² 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)).

²⁹³ 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.

²⁹⁴ NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

²⁹⁵ NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

²⁹⁶ A date close to this period can also be used. See NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

²⁹⁷ A date close to this period can also be used. See NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

2020, but which were later spoiled because there was no market for the products.²⁹⁸ 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.²⁹⁹

c. How to Submit Comments

Comments may be sent to USDA in one of two ways.³⁰⁰ 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

d. Deadline to Submit Comments—June 22, 2020

The deadline to submit comments to USDA on additional commodities is June 22, 2020.³⁰¹

VI. CFAP Sign-Up Process and Application

To apply for a CFAP payment, a farmer must submit a completed application. The following sections outline the key aspects of the CFAP application.

A. CFAP Application—Form AD-3114

Farmers may apply for CFAP for any commodity that is currently eligible under the program.³⁰² The Coronavirus Food Assistance (CFAP) Application is form AD-3114 and can be downloaded from USDA's website.³⁰³ This form must be complete when submitted, and it must be signed.³⁰⁴ If the application is completed but never signed it is not considered filed. Farmers may revise their CFAP Application to add additional

²⁹⁸ NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

²⁹⁹ NOFA, 85 Fed. Reg. 31062, 31064 (May 22, 2020).

³⁰⁰ NOFA, 85 Fed. Reg. 31062, 31065 (May 22, 2020); USDA, Coronavirus Food Assistance Program, "Ineligible Commodities and Request for Additional Commodities" (May 26, 2020).

³⁰¹ NOFA, 85 Fed. Reg. 31062, 31062 (May 22, 2020).

³⁰² FSA Notice CFAP-5, "Application Submission for Coronavirus Food Assistance Program (CFAP)," page 2, para. 2.A (June 15, 2020).

³⁰³ 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.

³⁰⁴ CFAP Handbook, page 2-57, para. 37.A, page 3-3, para. 50.C, page 3-8, para. 51.E (May 29, 2020).

commodities that are currently eligible as well as to add any commodities that are determined to be eligible for CFAP in the future.³⁰⁵

B. Farmer Self-Certification Required

The CFAP application largely involves farmer self-certification of information about the farming operation.³⁰⁶ Information that is essential for establishing the CFAP payment—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.³⁰⁷ 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 for three years after the approval date of the application.³⁰⁸

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.³⁰⁹ 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.³¹⁰

This requirement is made somewhat confusing by the fact that the application form asks farmers to certify knowledge of two things that appear to be inconsistent with current CFAP rules.³¹¹ First, farmers must certify that they know that all of the production, commodities, and inventory that are eligible for payment were subject to what USDA calls a price risk. Second, all farmers must certify that all eligible commodities were intended to be marketed for commercial production. At present, however, USDA does not require a price risk for all CFAP commodities,³¹² and does not require that all commodities be

³⁰⁵ FSA Notice CFAP-5, page 2, para. 2.A (June 15, 2020).

³⁰⁶ See Coronavirus Food Assistance Program (CFAP) Application, Form AD-3114: https://www.farmers.gov/sites/default/files/documents/AD3114_200519Vo1%20%20FINAL.pdf.

³⁰⁷ USDA, Coronavirus Food Assistance Program FAQ, “What documents do I need to submit with my application?” (June 9, 2020).

³⁰⁸ CFAP Handbook, page 1-11, para. 3.G (May 29, 2020).

³⁰⁹ USDA believes it is the farmers responsibility to be aware of the program and to accurately report required information on the application form. See Coronavirus Food Assistance Program (CFAP) Application, Form AD-3114, Part I, at: https://www.farmers.gov/sites/default/files/documents/AD3114_200519Vo1%20%20FINAL.pdf; CFAP Handbook, page 1-11, para. 3.G, page 1-12, para. 4.B (May 29, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What documents do I need to submit with my application?” (June 9, 2020).

³¹⁰ CFAP Handbook, page 1-12, para. 4.A-B (May 29, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What documents do I need to submit with my application?” (June 9, 2020).

³¹¹ See CFAP Handbook, page 3-2, para. 50.B (May 29, 2020). When submitting Form AD-3114, the farmer agrees that “any production/sales/inventory eligible for payment must be subject to price risk.” The farmer also agrees that payments will only be made for commodities “intended to be marketed for commercial production.” Form AD-3114, Part A.

³¹² See, for example, CFAP Rule Correction, 85 Fed. Reg. 35799, 35799-35800 (June 12, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.5(b)).

intended for commercial production.³¹³ While it seems unlikely that USDA would try to punish farmers that seek to use CFAP in the way that the rules currently allow, farmers are in an awkward position when they are required to sign a form that does not accurately describe the program in question.

Second, USDA says it will use spot checks of farmers' applications.³¹⁴ In the spot checks, USDA will ask for documentation that was used for the CFAP application.³¹⁵ USDA expects farmers to keep documents that were used for the application.³¹⁶ If the farmer provided inaccurate information on the CFAP application, the farmer may need to refund some of the payment.³¹⁷ 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.

C. 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.³¹⁸ FSA offices are currently available for phone appointments only, and farmers are advised to call their office to schedule an appointment.³¹⁹

The CFAP application can be submitted in-person (when available), by mail, email, or fax.³²⁰ Other authorized methods may also be allowed.³²¹ USDA is requesting that farmers call their local FSA office before submitting a CFAP application, even if the application is being submitted electronically.³²²

³¹³ For example, a May 29, 2020 amendment to the Handbook states that “Commodities used on the farm, such as silage, are eligible for CFAP.” See CFAP Handbook, page 5-22, para. 137.A (May 29, 2020).

³¹⁴ CFAP Handbook, page 3-5, para. 51.B (May 29, 2020).

³¹⁵ CFAP Handbook, page 3-5, para. 51.B (May 29, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What documents do I need to submit with my application?” (June 9, 2020).

³¹⁶ For examples of supporting documentation that farmers may need, see CFAP Handbook, pages 3-5 and 3-6, para. 51.B (May 29, 2020).

³¹⁷ 85 Fed. Reg. 30825, 30828 (May 21, 2020) (prefatory comments); CFAP Handbook, page 1-12, para. 4.A (May 29, 2020).

³¹⁸ 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>; USDA, Coronavirus Food Assistance Program FAQ, “Do all producers need to apply through the Farm Service Agency?” (June 9, 2020). 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)).

³¹⁹ For information on contacting and locating FSA Service Centers, see: <https://www.farmers.gov/coronavirus>.

³²⁰ 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 29, 2020); FSA Notice CFAP-4, page 4, para. 2.B (May 20, 2020).

³²¹ CFAP Handbook, page 3-1, para. 50.A (May 29, 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.

³²² See USDA, Coronavirus Food Assistance Program, How to Apply, at: <https://www.farmers.gov/cfap>.

D. USDA Assistance With Application—Call Center Available

For some farmers who have worked with FSA in the past, many of the required forms may be on file with FSA already. For other farmers, these forms will 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.³²³ USDA says that employees will be ready to assist farmers who call the CFAP Call Center.

E. Receipt for Service

USDA rules say that the agency must provide a Receipt for Service to a farmer if the farmer makes a request of the FSA.³²⁴ The receipt must explain the request and how FSA responded. In the usual case, FSA does not provide a receipt for service when the communication is by phone. During this time of COVID-19, however, when so much of farmer-FSA interactions are by phone, FSA must provide the receipt for service when that business request is made over the phone.³²⁵ Farmers working with FSA to apply for CFAP should receive receipts for service from USDA.

F. Application Generator and Payment Calculator

The USDA website also provides what it is calling a CFAP Application Generator and Payment Calculator.³²⁶ This is an Excel workbook 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.

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

USDA began accepting CFAP applications on May 26, 2020.³²⁷ The application period for CFAP ends at close of business on August 28, 2020.³²⁸ Any application submitted or postmarked after August 28, 2020 will not be approved for CFAP.³²⁹ The application period could end earlier if funds are exhausted before August 28, 2020.³³⁰

³²³ 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> (June 9, 2020); see also USDA Press Release No. 0283.20, USDA Issues First Coronavirus Food Assistance Program Payments (June 4, 2020), at: <https://www.usda.gov/media/press-releases/2020/06/04/usda-issues-first-coronavirus-food-assistance-program-payments>.

³²⁴ For example, see USDA, Receipt for Service, at: <https://www.usda.gov/partnerships/receipt-for-service>; see also FSA Form AD-2088, Receipt of Request for Benefit or Service Offered by USDA, at: <https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=34254.wba>.

³²⁵ Farm Service Agency (FSA), Clarifying Receipt for Service (RFS) During COVID-19, Notice AO-1751 (April 13, 2020), at: https://www.fsa.usda.gov/Internet/FSA_Notice/ao_1751.pdf

³²⁶ See USDA, Coronavirus Food Assistance Program, CFAP Application, at: <https://www.farmers.gov/cfap>.

³²⁷ CFAP Handbook, page 2-13, para. 21.B (May 29, 2020); FSA Notice CFAP-4, page 3, para. 2.A (May 20, 2020).

³²⁸ 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 29, 2020); FSA Notice CFAP-4, page 3, para. 2.A (May 20, 2020).

³²⁹ CFAP Handbook, page 2-13, para. 21.B, and page 3-8, para. 51.E (May 29, 2020).

³³⁰ CFAP Rule, 85 Fed. Reg. 30825, 30835 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(h)).

H. USDA Process for Reviewing CFAP Applications

USDA will review the CFAP application that the farmers submits.

1. Self-Certified by Farmer

As noted above, the CFAP application asks for information about the farmer's production, sales, inventories, and acreage.³³¹ That information is self-certified by the farmer.

2. USDA Reviews to See If Application “Reasonable” and “Accurate”

USDA says it will look to see if the information on the CFAP application is reasonable and accurate.³³² The review will be based on the application itself.³³³

The local USDA office will review the application to check that all producer and program eligibility requirements have been met, as well as to ensure that the application was submitted on time—postmarked by August 28, 2020.³³⁴ The local USDA office will also review the production, sales, and inventory information provided on the application.

3. USDA Can Ask for More Information

If the local USDA office thinks that the application is not reasonable or is questionable, USDA may request additional evidence from the farmer.³³⁵

When a farmer signs the CFAP application, the farmer agrees to give USDA “all information that is necessary to verify that the information on the form is accurate.”³³⁶ 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.

If USDA asks the farmer for more documentation of production, sales, acreage, or inventory for a commodity, and the farmer does not give USDA the documentation, USDA can adjust the application for that commodity, or USDA can deny the application altogether.³³⁷

The kinds of additional supporting documentation that USDA might request is discussed below.

³³¹ CFAP Handbook, page 2-56, para. 36.B, page 3-5, para. 51.B (May 29, 2020).

³³² CFAP Handbook, page 3-7, para. 51.D (May 29, 2020).

³³³ CFAP Handbook, page 3-7, para. 51.C (May 29, 2020).

³³⁴ CFAP Handbook, page 3-7, para. 51.C-D (May 29, 2020).

³³⁵ CFAP Handbook, pages 3-5 and 3-6, para. 51.B, page 3-8, para. 51.E (May 29, 2020).

³³⁶ 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 29, 2020).

³³⁷ CFAP Handbook, page 2-56, para. 36.B, page 3-5, para. 51.B (May 22, 2020).

4. Possible USDA Steps After Review of Application

After reviewing the application, and any additional information that has been given by the farmer, the USDA can take one of three steps.

a. Approve Application

The local USDA office can approve the CFAP application.³³⁸

b. Make “Adjustments”

USDA may make “adjustments” to the information that is reported on the application based on information that the farmer gives USDA.³³⁹ These adjustments, according to USDA rules, should be based on documentation. An adjustment can result in a lower payment.

c. Deny Application

USDA can deny the application—the official term is disapprove the application.³⁴⁰ USDA can deny the application if it decides the information on the application, or in the supporting documents provided by the farmer, is not accurate or reasonable.

USDA can also deny the application if: (1) the program eligibility rules are not met; (2) the producer is not eligible; (3) there is evidence that the farmer did not have an ownership interest in the commodity; (4) the application was late; or (5) the application was not properly signed.³⁴¹ The CFAP application is not considered filed with USDA unless it is signed.

d. Notice and Appeal Rights If Application is Adjusted or Denied

If the CFAP application is adjusted or denied by USDA, USDA must take several steps.

First, USDA must notify the farmer that USDA has either adjusted or denied the application.³⁴²

Second, USDA must notify the farmer that the farmer may appeal the decision.³⁴³ Appeals are discussed below.

³³⁸ CFAP Handbook, page 3-7, para. 51.C-D (May 22, 2020).

³³⁹ CFAP Handbook, page 1-11, para. 3.G, page 3-8, para. 51.E (May 22, 2020).

³⁴⁰ CFAP Handbook, page 1-11, para. 3.G, page 3-8, para. 51.E (May 22, 2020).

³⁴¹ CFAP Handbook, page 3-8, para. 51.E (May 22, 2020). The signature must be on Form AD-3114, in part I. Signature rules are in Signatures are discussed in FSA Handbook Common Management and Operating Provisions, 1-CM (Revision 3), page 25-1 to 25-15, para 676 to 681 (January 1, 2020).

³⁴² CFAP Handbook, page 3-8, para. 51.E (May 22, 2020).

³⁴³ CFAP Handbook, page 3-8, para. 51.E (May 22, 2020).

Third, USDA must document the reason for the adjustment or denial in the minutes for the USDA county committee.³⁴⁴ This information can become important if the farmer appeals the USD decision.

VII. Required Forms and Documentation

Several forms and supporting documentation are required for CFAP.

A. Required Eligibility Forms

There are several forms that farmers must submit in order to eligible for CFAP.³⁴⁵ USDA calls these required forms eligibility forms.

Each of these forms must be submitted within sixty days from the date on which the farmer signs the CFAP application.³⁴⁶ If they are not submitted within this timeframe, the farmer may receive a reduced payment or no payment at all.³⁴⁷

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

1. CFAP Application—Form AD-3114

First, as described in more detail above, to be eligible for CFAP the farmer must submit a completed and signed application, Form AD-3114.³⁴⁸

2. Farm Operating Plan (Form CCC-902)

A farm operating plan must be submitted.³⁴⁹ This is known as Form CCC-902. It must be submitted within sixty days of signing the CFAP application.³⁵⁰

³⁴⁴ CFAP Handbook, page 3-8, para. 51.E (May 22, 2020).

³⁴⁵ CFAP Handbook, page 2-11, para. 20.A, page 2-57, para. 37.A (May 29, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30831-30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)). At one point, USDA says that if these four forms are not complete, the result could be a reduction in payment, or in no payment at all. CFAP Handbook, page 2-11, para. 20.A (May 29, 2020). At another point, USDA says that all eligibility forms must be filed before a CFAP payment will be issued. CFAP Handbook, page 2-57, para. 37.A (May 29, 2020).

³⁴⁶ CFAP Rule, 85 Fed. Reg. 30825, 30827, 30831 (May 21, 2020) (prefatory comments and to be codified at 7 C.F.R. § 9.4(b)); CFAP Handbook, page 2-11, para. 20.A, page 3-2, para. 50.B (May 22, 2020); FSA Notice CFAP-4, page 8, para. 3.G (May 20, 2020).

³⁴⁷ CFAP Rule, 85 Fed. Reg. 30825, 30827 (prefatory comments), 30831 (to be codified at 7 C.F.R. § 9.4(b)); CFAP Handbook, page 2-11, para. 20.A (May 29, 2020); FSA Notice CFAP-4, page 8, para. 3.F-G (May 20, 2020);

³⁴⁸ CFAP Handbook, page 2-57, para. 37.A, page 3-3, para. 50.C, page 3-8, para. 51.E (May 29, 2020).

³⁴⁹ CFAP Application, Form AD-3114, Part A; 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 29, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020). Instructions for one version of Form CCC-902, and an example of the Form, can be found in the Payment Eligibility Handbook, 5-PL, pages 4-65 to 4-69, para. 195.A (October 2, 2019). Form CCC-902 must be completed according to the Payment Eligibility Handbook, 5-PL.

³⁵⁰ 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 2-11, para. 20.A, page 2-57, para. 37.A (May 29, 2020). The form should be filled out according to FSA Handbook, 5-PL (Amendment 6), Payment Eligibility, Payment Limitation, and

The farm operating plan is a commonly used USDA form, so most farmers that work with USDA will already have this form on file. Many farmers who have not worked with USDA will need to fill out the form for the first time.

For CFAP purposes, only parts A and B of Form CCC-902 are required.³⁵¹ This means the farmer will need to give contact information, a social security or tax identification number, citizenship status, and information about other farming interests.

The USDA website says that USDA staff will help applicants complete the required parts of Form CCC-902.³⁵²

3. 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.³⁵³ This form, known as CCC-901, collects information on legal entities. Specifically, it collects contact information on members, including citizenship status, as well as Tax Identification Numbers.

If it applies, Form CCC-901 must be submitted within sixty days of signing the CFAP application.³⁵⁴ If the farmer does not meet this deadline, the farmer's CFAP payment may be reduced or denied.

4. Average Adjusted Gross Income Statements—(Form CCC-941 and Form CCC-942, If Applicable)

Farmers applying for CFAP must certify their average adjusted gross income (AGI).³⁵⁵ There are two potential forms that may be required to meet this requirement.³⁵⁶ First, a farmer should submit an Average Adjusted Gross Income Certification, form CCC-

Average Adjusted Gross Income—Agricultural Act of 2014 (October 2, 2019). If not signed within the sixty-day timeframe, payment may be reduced or denied. CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(1)).

³⁵¹ CFAP Application, Form AD-3114, Part A; CFAP Handbook, page 2-10, para. 19.A (May 29, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020). Form CCC-902 asks if the farmer is a citizen, whether the farmer has a Resident Alien Card (I-551) or is a foreign person. Other parts of Form CCC-902, which are not required for CFAP, ask for information about the land to be used, including the farm number, equipment, labor, source of capital, and management of the farm.

³⁵² See USDA, Coronavirus Food Assistance Program, CFAP Application, at: <https://www.farmers.gov/cfap>.

³⁵³ Form CCC-901 is available in English and Spanish, at: <https://www.farmers.gov/cfap>. For this requirement, see CFAP Application, Form AD-3114, Part A; CFAP Handbook, Exhibit 20, pages 5-6 (May 29, 2020); CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(2)). Instructions for Form CCC-901, and an example of a Form, can be found in the Payment Eligibility Handbook, 5-PL, pages 2-254 to 2-261, para. 140 (October 2, 2019).

³⁵⁴ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(2)).

³⁵⁵ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(3)-(4)); CFAP Handbook, page 2-57, para. 37.A (May 29, 2020). Tax years 2016, 2017, and 2018 are used to calculate AGI for 2020 CFAP. The form should be filled out according to FSA Handbook, 5-PL (Amendment 6), Payment Eligibility, Payment Limitation, and Average Adjusted Gross Income – Agricultural Act of 2014 (October 2, 2019). If not signed within this time payment may be reduced or denied. See, as well, FSA Notice PL-289, CFAP AGI Certifications (June 1, 2020).

³⁵⁶ USDA, Coronavirus Food Assistance Program FAQ, “Who must fill out forms CCC-941 and CCC-942 to certify average AGI and Farm AGI?” (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

941, which provides a certification of AGI and a consent to tax disclosure.³⁵⁷ If a farmer's income is more than the average AGI limitations for CFAP, a farmer should also submit a Certificate of Income from Farming, Ranching, and Forestry.³⁵⁸ This is known as Form CCC-942.³⁵⁹

Both form CCC-941 and form CCC-942 must be submitted within sixty days of signing the CFAP application.³⁶⁰ If the farmer does not meet this deadline, the farmer's CFAP payment may be reduced or denied.

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

To take part in most USDA farm programs farmers must meet what are commonly called conservation compliance requirements.³⁶¹ This is true for CFAP, although the rules that apply are a bit unusual.³⁶² When applying for CFAP, the application requires that farmers agree to comply with certain conservation compliance rules.³⁶³

The following sections explain the conservation compliance rules for CFAP.

a. Form AD-1026

Generally, farmers meet the conservation compliance requirements for various USDA programs by completing Form AD-1026.³⁶⁴ That often also means providing documentation about the farmland.³⁶⁵

³⁵⁷ Form CCC-941 is available in English and Spanish, at: <https://www.farmers.gov/cfap>. For this requirement, see 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(b)(3)); CFAP Handbook, page 2-7, para. 17.A, page 2-57, para. 37.A (May 29, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020). Instructions for Form CCC-941, and an example of a Form, can be found in the Payment Eligibility Handbook, 5-PL, pages 6-36 to 6-38, para. 302.E-F (October 2, 2019).

³⁵⁸ For this requirement, see 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(b)(4)); CFAP Handbook, page 2-57, para. 37.A (May 29, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020).

³⁵⁹ A downloadable copy of form CCC-942, with instructions, is available at: <https://www.farmers.gov/cfap>.

³⁶⁰ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(3)-(4)).

³⁶¹ USDA, Coronavirus Food Assistance Program FAQ, "Do the Farm Bill's conservation compliance requirements apply to CFAP?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>. Conservation compliance rules can be found in FSA Handbook, Highly Erodible Land Conservation and Wetland Conservation Provisions, 6-CP (Revision 4) (June 21, 2019).

³⁶² CFAP Application, Form AD-3114, Part A; CFAP Handbook, page 2-8, para. 18.A (May 29, 2020).

³⁶³ CFAP Handbook, pages 2-8 and 2-9, para. 18.A (May 29, 2020). On the CFAP application, the conservation compliance sections are found at Form AD-3114, Part A, numbers 7, 7A, 7B, and 8.

³⁶⁴ 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 2-57, para. 37.A (May 29, 2020). The rules for this form are in FSA Handbook, Highly Erodible Land Conservation and Wetland Conservation Provisions, 6-CP (Revision 4) (June 21, 2019). Form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification, is available in English and Spanish, at: <https://www.farmers.gov/cfap>.

³⁶⁵ Highly Erodible Land Handbook, 6-CP, page 6-122, para. 641.D (June 21, 2019).

For some farmers, only a part of the Form AD-1026 needs to be completed. These rules apply for CFAP.³⁶⁶ USDA has also loosened the timing of conservation compliance for CFAP for some farmers. If Form AD-1026 is required, a farmer must submit it within sixty days of signing the CFAP application.³⁶⁷ If the farmer does not meet this deadline, the farmer's CFAP payment may be reduced or denied.

b. Some Farmers Already Have a Certified Form AD-1026

Some farmers have an ongoing certification of conservation compliance. Once a Form AD-1026 is certified by USDA, it remains in effect.³⁶⁸ FSA calls this continuous certification. Even with continuous certification, farmers must complete a new Form AD-1026 if certain changes are made to the farming operation.³⁶⁹

Most rules for continuous certification are applicable to farmers applying for CFAP.³⁷⁰ In other words, farmers who have previously filed Form AD-1026, and who have not undergone changes to their farming operation that require a new Form AD-1026 to be submitted, will not need to file AD-1026 when applying for CFAP.

c. Some Farmers Must Only Complete Part of Form AD-1026

Some farmers will not need to fill out the entire Form AD-1026.³⁷¹ They can instead fill out a part of the Form and not respond to a number of additional questions. In general, this rule applies to: (1) farmers that have no interest in agricultural land; and (2) many farmers that raise perennial crops.

In addition, if farmers are able to meet either of these two exceptions, they would seem not to need to have farm records established—which would mean the farmer would not need to get a farm number from USDA.³⁷² Farm numbers are discussed more below.

(i) No Interest in Agricultural Land

Farmers do not need to fill out the entire Form AD-1026 if they do not have interest in land devoted to agriculture.³⁷³ This means the farmer does not own and does not rent agricultural land, including cropland,

³⁶⁶ See 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(b)(5)); CFAP Handbook, page 2-8, para. 18.A (May 29, 2020).

³⁶⁷ CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)).

³⁶⁸ See Highly Erodible Land Handbook, 6-CP, page 3-8.6, para. 303.E (June 21, 2019); CFAP Handbook, page 2-8, para. 18.A (May 29, 2020); Form AD-1026, Part D.

³⁶⁹ See Highly Erodible Land Handbook, 6-CP, page 3-8.6, para. 303.E (June 21, 2019); Form AD-1026, Part D.

³⁷⁰ CFAP Handbook, page 2-8, para. 18.A (May 29, 2020).

³⁷¹ CFAP Handbook, page 2-8, para. 18.A (May 29, 2020). The farmer would only need to complete Part A and Part D of Form AD-1026, and check box 5B.

³⁷² Highly Erodible Land Handbook, 6-CP, page 6-122, para. 641.D (June 21, 2019).

³⁷³ CFAP Application, AD-3114, Part A. On Form AD-1026 that means the farmer checks box 5A.

rangeland, pasture, and forestland. Further, it means the farmer does not raise a commodity by sharing in a crop.³⁷⁴

In general, for this exception to apply, the farmer must be a producer of livestock, nursery crops, honey, or other commodities that are not produced from the tillage of land.³⁷⁵ Under this exception, USDA has in mind farmers that keep bees on someone else's land but do not rent the land.³⁷⁶ USDA also thinks it applies if the farmer produces crops in a greenhouse, or if the farmer is a producer of aquaculture. In each of these examples, the farmer must not own or lease any agriculture land.

If a farmer meets this exception, the farmer must only fill out a portion of Form AD-1026 in order to participate in CFAP.³⁷⁷

(ii) Perennial Crops and No Farm Program Payments Except for CFAP

Farmers will only need to fill out part of Form AD-1026 if they can certify that three things are true.³⁷⁸

First, the farmer must be able to certify that the only USDA programs subject to conservation compliance that the farmer participates in are CFAP and federal crop insurance.³⁷⁹

Second, the farmer must be able to certify that the farmer only has interest in land that produces perennials.³⁸⁰ In general, a perennial crop, for the purposes of conservation compliance, is a crop that is planted once and produces a crop over multiple years.³⁸¹ This includes fruit trees, native pasture, and perennial forage. For the purposes of Form AD-1026, perennial crops include, but are not limited to, tree fruit, tree nuts, grapes, native pasture and perennial forage.³⁸² Perennial crops, for this purpose, do not include sugar cane.³⁸³

³⁷⁴ Form AD-1026, Part A, Item 5A.

³⁷⁵ Form AD-3114, Part A, Item 7B; see also CFAP Handbook, page 2-9, para. 18.A (May 29, 2020).

³⁷⁶ Form AD-1026, Part A, Item 5A.

³⁷⁷ The farmer must check Box 5A of Form AD-1026 as well as self-certify compliance with the conservation rules. See CFAP Handbook, page 2-9, para. 18.A (May 29, 2020); CFAP Application, AD-3114, Part A, Items 7B, 8.

³⁷⁸ CFAP Handbook, page 2-8, para. 18.A (May 29, 2020). Farmers that meet this requirement would check Box 5B on Form AD-1026.

³⁷⁹ Form AD-1026, section 5; CFAP Handbook, page 2-8, para. 18.A (May 29, 2020).

³⁸⁰ CFAP Handbook, page 2-8, para. 18.A (May 29, 2020); Form AD-1026, Part A, Section 5, Appendix, no. 3. If the farmer produces alfalfa this may qualify, but it might not. The farmer must check with USDA if the farmer produces alfalfa. USDA provides a list of perennial crops, at: www.nrcs.usda.gov/compliance.

³⁸¹ Form AD-1026, Appendix, no. 3.

³⁸² CFAP Handbook, page 2-8, para. 18.A (May 29, 2020); Form AD-1026, Part A, Section 5.

³⁸³ CFAP Handbook, page 2-8, para. 18.A (May 29, 2020).

Third, the farmer must be able to certify that the farmer has not converted a wetland after December 23, 1985.³⁸⁴

If a farmer meets this exception, the farmer must only fill out a portion of Form AD-1026 in order to participate in CFAP.³⁸⁵

d. Some Farmers Must Complete the Entire Form AD-1026

Any farmers who have not filled out a complete Form AD-1026 in the past will need to do so if they apply for CFAP and do not qualify for either of the two above exceptions.³⁸⁶

Usually, filling out a complete Form AD-1026 would require additional documents and would mean establishing farm records.³⁸⁷ Establishing a farm record means the farmer must receive a farm number from USDA.³⁸⁸

For CFAP, the rules are less strict. Once USDA receives a Form AD-1026, USDA will consider the Form AD-1026 to be certified. Later, the farmer will be contacted to establish the required farm records.³⁸⁹ It is unclear whether FSA will require farmers to create a farm record in order to receive a CFAP payment.

B. Additional Supporting Documentation

As noted above, in some cases USDA will request that a farmer provide additional supporting documentation to verify the information given on the CFAP application.³⁹⁰ This can occur if USDA thinks that the application is not reasonable or is questionable.³⁹¹

The following are the types of information that USDA may request additional documentation for in order to substantiate.

³⁸⁴ CFAP Handbook, page 2-8, para. 18.A (May 29, 2020); Form AD-1026, Part A, Section 5. The CFAP Handbook says the farmer must not have converted a wetland after December 23, 1985. Form AD-1026 says the farmer has not converted a wetland after February 7, 2014.

³⁸⁵ The farmer must check Box 5B of Form AD-1026 as well as self-certify compliance with the conservation rules. See CFAP Handbook, page 2-8, para. 18.A (May 29, 2020); CFAP Application, AD-3114, Part A. Items 7A, 8.

³⁸⁶ CFAP Handbook, page 2-9, para. 18.A (May 29, 2020). When filling out form AD-1026, farmers must follow the rules in the Highly Erodible Land Handbook, 6-CP (June 21, 2019).

³⁸⁷ Highly Erodible Land Handbook, 6-CP, page 6-122, para. 641.D (June 21, 2019).

³⁸⁸ See, for example, FSA Handbook, Farm Records and Reconstitutions for Current Year, 10-CM (Revision 1), page 1-4, para. 3.B, pages 2-8 and 2-9, para. 24.A-C, page 2-35, para. 33.A (September 11, 2019).

³⁸⁹ CFAP Handbook, page 2-9, para. 18.A (May 29, 2020).

³⁹⁰ CFAP Application, Form AD-3114, Part A; 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(c)); CFAP Handbook, page 1-12, para. 4.A, pages 3-5 and 3-6, para. 51.B, page 3-8, para. 51.E (May 29, 2020).

³⁹¹ CFAP Handbook, pages 3-5 and 3-6, para. 51.B, page 3-8, para. 51.E (May 29, 2020).

1. 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.³⁹²

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.

2. 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.³⁹³

3. 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.³⁹⁴

4. Verification of Amounts Listed on Application

If requested by USDA, a farmer must provide documentation that substantiates the amounts listed on the farmer's CFAP application.³⁹⁵ 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.

The following are examples of the supporting documentation that USDA has in mind to substantiate a farmer's inventory and production for specific commodities.

a. Dairy

According to USDA, the following are examples of production evidence for dairy: (1) milk marketing statements for the first three months of 2020; (2) records documenting that milk was dumped in the first three months of 2020; and (3) other records that USDA decides are acceptable.³⁹⁶

b. Non-Specialty, Specialty, Value-Loss Crops, and Wool

For specialty crops, non-specialty crops, value-loss crops, and wool, USDA gives the following examples of supporting documentation to verify production: (1) sales receipts; (2) other sales documents indicating when a commodity was forward priced; (3) ledgers of income; (4) income statements and deposit slips; (5) register tapes; (6) invoices for custom harvesting; (7) records that verify

³⁹² CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(1)).

³⁹³ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(2)).

³⁹⁴ CFAP Rule, 85 Fed. Reg. 30825, 30832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(3)).

³⁹⁵ CFAP Rule, 85 Fed. Reg. 30825, 30827 (prefatory comments) (May 21, 2020); CFAP Handbook, pages 3-5 and 3-6, para. 51.B (May 22, 2020).

³⁹⁶ CFAP Handbook, page 3-5, para. 36.B (May 22, 2020).

production costs; and (8) truck sale tickets.³⁹⁷ USDA will also accept contemporaneous diaries that USDA decides are acceptable, as well as contemporaneous measurements. Contemporaneous means that the diary was written at the time the events took place. A contemporaneous measurement of inventory for March 1, for example, would be a measurement that took place on March 1, and was not estimated later.

In addition, USDA says it will accept other records that it thinks are acceptable.³⁹⁸

c. Livestock

For livestock, USDA gives examples of sources of production evidence that would be acceptable.³⁹⁹ They include: (1) breeding records; (2) feeding records; (3) inventory records; (4) rendering receipts; (5) sales receipts; and (6) veterinary records.

USDA will also accept other records that USDA thinks are acceptable.⁴⁰⁰

C. Additional 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.⁴⁰¹

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.⁴⁰² 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.⁴⁰³

³⁹⁷ CFAP Handbook, page 3-5, para. 36.B (May 22, 2020).

³⁹⁸ CFAP Handbook, page 3-5, para. 36.B (May 22, 2020).

³⁹⁹ CFAP Handbook, page 3-6, para. 36.B (May 22, 2020).

⁴⁰⁰ CFAP Handbook, page 3-6, para. 36.B (May 22, 2020).

⁴⁰¹ Form AD-2047 is available at: <https://www.farmers.gov/cfap>.

⁴⁰² CFAP Handbook, page 2-10, para. 19.A (May 29, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020).

⁴⁰³ Form SF-3881 is available at: <https://www.farmers.gov/cfap>.

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 a certification to that effect using form CCC-860.⁴⁰⁴ This certification is completely optional.⁴⁰⁵ The information on form CCC-860 does not affect CFAP eligibility or impact a farmer's potential CFAP payment in any way.

D. Spot Checks

USDA says it will do some spot checks of farmers to confirm that information given to USDA is accurate.⁴⁰⁶

E. 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.⁴⁰⁷ This includes documentation of production, sales, inventory, and acreage.⁴⁰⁸

F. Farm Numbers

As it stands right now, USDA says it 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.⁴⁰⁹

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.

⁴⁰⁴ Form CCC-860 is available at:

https://forms.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/CCCo860_140402Vo1.pdf.

⁴⁰⁵ FSA Notice CFAP-4, page 18, para. 6.B (May 20, 2020).

⁴⁰⁶ CFAP Handbook, page 3-5, para. 51.B (May 29, 2020).

⁴⁰⁷ 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 29, 2020).

⁴⁰⁸ CFAP Handbook, page 2-56, para. 36.B (May 29, 2020).

⁴⁰⁹ 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.

A. Made in Two Disbursements

In general, payments for the CFAP are made in two disbursements.⁴¹⁰ An initial payment will account for 80 percent of the farmer's maximum eligible CFAP payment.⁴¹¹ 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.⁴¹² In order to remain within the sixteen billion dollar budget for the CFAP direct payments program, FSA may prorate the second payment.⁴¹³ 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.⁴¹⁴

B. 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.⁴¹⁵ 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.⁴¹⁶

⁴¹⁰ 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 29, 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?” (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴¹¹ 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).

⁴¹² 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 29, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

⁴¹³ 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?” (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴¹⁴ 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>.

⁴¹⁵ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments).

⁴¹⁶ CFAP Rule, 85 Fed. Reg. 30825, 30826, 30827 (May 21, 2020) (prefatory comments).

C. Payment Rates Set By USDA

CFAP payments are calculated, in part, using payment rates that USDA has set for each eligible commodity.⁴¹⁷ A description of how USDA determines these payment rates is described immediately below.

1. Non-Specialty Crop Payment Rates

Payment rates for non-specialty crops are expressed as an average rate per unit—bushel, pound, or hundredweight—for each eligible crop.⁴¹⁸ There is one payment rate per crop, and it applies nationwide.⁴¹⁹

USDA says it determined the payment rates for non-specialty crops by taking 50 percent of the futures price decline in the weekly average between the average for the week of January 13-17, 2020, compared to the average for the week of April 6-9, 2020.⁴²⁰

2. Specialty Crop Payment Rates

For purposes of CFAP payments and payment rates, specialty crops are divided into three broad categories: (1) Sales (2) Delivered and Unpaid; and (3) Not Delivered.⁴²¹ These categories are described in more detail below.

USDA has set one payment rate for each category of eligible specialty crop, and that rate applies nationwide.⁴²² For example, almonds—an eligible specialty crop—have a different payment rate depending on whether the almonds fall into the category of Sales, Delivered and Unpaid, or Not Delivered.⁴²³

Specialty crops that fall within the Sales category are those that were sold between January 15, 2020, and April 15, 2020.⁴²⁴ Specialty crops in the Delivered and Unpaid

⁴¹⁷ 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 29, 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>.

⁴¹⁸ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 5-1, para. 125.B (May 29, 2020). If futures prices were not available for the crop, USDA used cash prices.

⁴¹⁹ CFAP Handbook, page 5-51, para. 151.A (May 29, 2020). For the USDA payment rates for eligible non-specialty crops, see CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(h)).

⁴²⁰ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 5-1, para. 125.B (May 29, 2020). If futures prices were not available for the crop, USDA used cash prices.

⁴²¹ CFAP Handbook, page 8-1, para. 211., page 8-45, para. 235.A (May 29, 2020).

⁴²² CFAP Handbook, page 8-45, para. 235.A (May 29, 2020). For the USDA payment rates for eligible specialty crops, see CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(h)); CFAP Handbook, pages 8-45 and 8-46, para. 235.A (May 29, 2020).

⁴²³ See CFAP Handbook, page 8-45, para. 235.A (May 29, 2020).

⁴²⁴ 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 29, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>. Specialty crops that were under

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 include crops that did not leave the farm, crops that were donated, or mature crops that remained unharvested between January 15, 2020, and April 15, 2020.⁴²⁵ To fall within the category of Not Delivered, the specialty crops cannot be sold.⁴²⁶

a. Sales

Specialty crops that fall within the Sales category are those that suffered a five percent or more price loss between mid-January and Mid-April as a result of the COVID-19 crisis.⁴²⁷ These payments come from CARES Act funds.⁴²⁸

For specialty crops that fall within the Sales category, USDA says payment rates are set by taking 80 percent of the eligible crop's price decline in the weekly average between the average for the week of January 13-17, 2020, compared to the average for the week of April 6-9, 2020.⁴²⁹

b. Delivered and Unpaid

Specialty crops that fall within the Delivered and Unpaid category are those that were shipped but later spoiled due to loss of a market.⁴³⁰ These payments are made using CARES Act funds.⁴³¹

For specialty crops that fall within the Delivered and Unpaid category, USDA says payment rates are set by taking 30 percent of the eligible crop's national sales value.⁴³²

an agreed upon set price before January 15, and which were paid that amount or higher, do not qualify under the Sales category. See CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)).

⁴²⁵ CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3)); 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 29, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?", "If producers donated their specialty crop, are they eligible for Category 2 or Category 3 payments?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴²⁶ CFAP Handbook, page 8-1, para. 211.B (May 29, 2020).

⁴²⁷ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 8-1, para. 211.A (May 29, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴²⁸ CFAP Handbook, page 8-1, para. 211.A (May 29, 2020).

⁴²⁹ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 8-1, para. 211.B (May 29, 2020).

⁴³⁰ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 8-1, para. 211.A (May 29, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴³¹ CFAP Handbook, page 8-1, para. 211.A (May 29, 2020).

⁴³² CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 8-1, para. 211.B (May 29, 2020).

c. Not Delivered

Specialty crops that fall within the Not Delivered category include crops that did not leave the farm, crops that were donated, or mature crops that remained unharvested between January 15, 2020, and April 15, 2020.⁴³³ Payments for this category of crops are determined based on the number of acres left in the field or harvested but not shipped, and the payments are made using CCC funds.⁴³⁴

For specialty crops that fall within the Not Delivered category, USDA says payment rates are set by taking 5.875 percent of the eligible crop's national value.⁴³⁵

3. Livestock Payment Rates

USDA says it determined payment rates for eligible livestock—meaning cattle, hogs, pigs, lambs and yearlings—based on the price declines for each type of eligible livestock between the average for the week of January 13-17, 2020, compared to the average for the week of April 6-10, 2020.⁴³⁶ The payments rates are set on a per-head basis to reflect the price declines.

4. Dairy Payment Rates

For dairy—meaning milk—USDA has determined two different payments rates.⁴³⁷ The first rate was determined by taking 80 percent of the national price decline in milk for the first quarter of 2020. The second payment rate was determined by taking 25 percent of the national price decline in milk for the first quarter of 2020. As described in more detail below, both of these payment rates are used to calculate a farmer's CFAP payment for dairy.

⁴³³ CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3)); 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 29, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?", "If producers donated their specialty crop, are they eligible for Category 2 or Category 3 payments?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴³⁴ CFAP Handbook, page 8-1, para. 211.A, page 8-23, para. 222.A, pages 8-45 and 8-46, para. 235.A (May 29, 2020). The payment rate table listed in the CFAP Handbook indicates that specialty crops that are not delivered are paid per acre. See CFAP Handbook, pages 8-45 and 8-46, para. 235.A (May 29, 2020). The CFAP Application itself also requires information on the acres of crops that were not shipped or sold. See CFAP Application, form AD-3114, Part G. However, the payment rate table in the CFAP Rule indicates that specialty crops that were not delivered are paid per pound, not per acre. See CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(h)).

⁴³⁵ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 8-1, para. 211.B (May 29, 2020).

⁴³⁶ CFAP Handbook, page 6-1, para. 165.B (May 29, 2020).

⁴³⁷ CFAP Rule, 85 Fed. Reg. 30825, 30826-30827 (May 21, 2020) (prefatory comments); CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(h)); CFAP Handbook, page 4-1, para. 85.B (May 29, 2020). For the USDA payment rates for dairy, see CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(h)); CFAP Handbook, page 4-71, para. 111.A (May 29, 2020).

5. Wool Payment Rates

USDA has calculated two different payment rates, per pound, for wool.⁴³⁸ Both rates were determined using the Eastern Market Indicator, as reported by the AMS in the National Wool Review, for the weeks ending with January 17, 2020 and April 10, 2020. A comparison between just those two weeks was used. The first payment rate was determined by taking 50 percent of the price decline in wool between those two weeks, while the second payment rate was determined by taking 55 percent of the price decline between those two weeks. As described in more detail below, both of these payment rates are used to calculate a farmer's CFAP payment for wool.

D. Payment Calculations

CFAP payments are calculated by USDA for each eligible commodity.⁴³⁹ USDA 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; and (5) wool.

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.⁴⁴⁰

As noted earlier, farmers applying for CFAP can use the USDA CFAP Application Generator and Payment Calculator, an Excel workbook that automatically calculates the farmer's potential CFAP payment.⁴⁴¹ The sections that follow describe the logic of how USDA, and the payment calculator, determine a farmer's CFAP payment for each eligible commodity. The logic behind the CFAP payments is confusing at times.

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, 2020.⁴⁴² 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. Sometimes FSA refers to unpriced inventory as being inventory that is subject to price risk.⁴⁴³

⁴³⁸ CFAP Rule, 85 Fed. Reg. 30825, 30826-30827 (May 21, 2020) (prefatory comments); CFAP Handbook, page 5-1, para. 125.B (May 29, 2020).

⁴³⁹ 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 29, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴⁴⁰ CFAP Handbook, page 2-15, para. 22.A (May 29, 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>.

⁴⁴¹ The CFAP Application Generator and Payment Calculator can be downloaded from the Coronavirus Food Assistance Program website, at: <https://www.farmers.gov/cfap>.

⁴⁴² 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 2-15, para. 22.A (May 29, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020).

⁴⁴³ CFAP Handbook, page 2-16, para. 22.A, page 5-2, para. 125.C, "Unpriced inventory," page 5-31, para. 141.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop

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.⁴⁴⁴

Step One: Determine the farmer's eligible unpriced 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.⁴⁴⁵

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 part of the payment that comes from CARES Act funding.⁴⁴⁶

b. CCC Funding Formula

The following steps are taken to determine the part of non-specialty crop payments that come from CCC funding.⁴⁴⁷

Step One: Determine the farmer's eligible unpriced 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.⁴⁴⁸

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

Producers (May 2020); see also FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020). For examples of forward contracts, see CFAP Handbook, page 5-31, para. 141.B, pages 5-33 through 5-36, para. 141.D (May 29, 2020).

⁴⁴⁴ 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); CFAP Handbook, page 5-1, para. 125.B (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020).

⁴⁴⁵ 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 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020). For a farmer to report 2019 production of a non-specialty crop, the farmer must have had title to the commodity. See CFAP Handbook, page 5-24, para. 138.D (May 29, 2020).

⁴⁴⁶ 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 5-51, para. 151.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020).

⁴⁴⁷ CFAP Rule, 85 Fed. Reg. 30825, 30832-30833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)(2), (h)).

⁴⁴⁸ 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 29, 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 portion of the CFAP payment that comes from CCC funding.⁴⁴⁹

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.⁴⁵⁰

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 and Unpaid; and (3) Not Delivered.⁴⁵¹

Specialty crops that fall within the Sales category are those that were sold between January 15, 2020, and April 15, 2020.⁴⁵² Specialty crops in the Delivered and 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 include crops that did not leave the farm, crops that were donated, or mature crops that remained unharvested between January 15, 2020, and April 15, 2020.⁴⁵³ To fall within the category of Not Delivered, the specialty crops cannot be sold.⁴⁵⁴

In order to be eligible for a CFAP payment, specialty crops in the Sales category must be subject to price risk.⁴⁵⁵ This means that specialty crops that were under an agreed

⁴⁴⁹ 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 5-51, para. 151.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (May 2020).

⁴⁵⁰ 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 29, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

⁴⁵¹ CFAP Handbook, page 8-1, para. 211.A (May 29, 2020).

⁴⁵² 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 29, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>. Specialty crops that were under an agreed upon set price before January 15, and which were paid that amount or higher, do not qualify under the Sales category. See CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)).

⁴⁵³ CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3)); 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 29, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?", "If producers donated their specialty crop, are they eligible for Category 2 or Category 3 payments?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴⁵⁴ CFAP Handbook, page 8-1, para. 211.B (May 29, 2020).

⁴⁵⁵ CFAP Handbook, page 8-1, para. 211.B (May 29, 2020). USDA sometimes refers to crops that are subject to price risk as being "unpriced." See CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, "Unpriced"); 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

upon set price before January 15, 2020 and which were paid that amount or higher, do not qualify under the Sales category.⁴⁵⁶ However, for specialty crops in the Delivered and Unpaid category or the Not Delivered category, there is no requirement that the crops must have been subject to price risk.

CFAP payments are based on a farmer's nationwide ownership interest in each specialty crop, regardless of where the crop was produced or where it is stored.⁴⁵⁷ By ownership interest, FSA does not mean a farmer's interest as a landowner, but rather the farmer's interest as the owner of the crop—the one with control and title to the crop.

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 funds specialty crop losses that fall into the Sales and Delivered but Unpaid categories.⁴⁵⁸

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

(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, and which were not paid at an agreed upon price that was set prior to January 15, 2020.⁴⁵⁹

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.⁴⁶⁰ Records to be kept are discussed in more detail below.

'subject to price risk' mean?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>; FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

⁴⁵⁶ CFAP Rule Correction, 85 Fed. Reg. 35799, 25799-35800 (June 12, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.5(b)).

⁴⁵⁷ CFAP Handbook, page 8-23, para. 222.A (May 29, 2020).

⁴⁵⁸ 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 29, 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).

⁴⁵⁹ CFAP Rule Correction, 85 Fed. Reg. 35799, 25799-35800 (June 12, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.5(b)); 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.B (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

⁴⁶⁰ 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 Category 1 specialty crops.⁴⁶¹

(ii) Category 2: Crops Delivered and 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 and 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, 2020.⁴⁶²

Step One: Determine the quantity of specialty crops that fall within the category of Delivered and Unpaid. Farmers must have documentation to show that no payment was received for these specialty crops.⁴⁶³ 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.

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 and Unpaid specialty crops.⁴⁶⁴

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.⁴⁶⁵ These include mature crops that remained unharvested between January 15, 2020, and April 15, 2020, due to a lack

⁴⁶¹ 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 8-45 and 8-46, para. 235.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020). A June 12, 2020 rule amended the payment rate for carrots that were sold between January 15, 2020 and April 15, 2020. The previous rate was \$0.2 per pound and the new rate is \$0.02 per pound. See CFAP Rule Correction, 85 Fed. Reg. 35799, 35799-35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(h)).

⁴⁶² CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(2)); 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.B (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

⁴⁶³ See FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

⁴⁶⁴ 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 Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(2)); CFAP Handbook, pages 8-45 and 8-46, para. 235.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

⁴⁶⁵ 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 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

of marketing channels. For example, this would include crops that were plowed under.⁴⁶⁶ Crops in the Not Delivered category also include 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.⁴⁶⁷ Finally, crops that were donated between January 15, 2020 and April 15, 2020 can also fall within the category of Not Delivered.⁴⁶⁸

The following steps are used to calculate the payment for specialty crops that fall within the category of Not Delivered.⁴⁶⁹

Step One: Determine the acres 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 amounts.⁴⁷⁰

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.⁴⁷¹

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.⁴⁷²

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.⁴⁷³ CARES Act funding is used to pay for

⁴⁶⁶ FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

⁴⁶⁷ FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

⁴⁶⁸ CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3)); USDA, Coronavirus Food Assistance Program FAQ, "If producers donated their specialty crop, are they eligible for Category 2 or Category 3 payments?" (June 9, 2020).

⁴⁶⁹ CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3)); 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.B (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

⁴⁷⁰ 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.

⁴⁷¹ 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 8-45 and 8-46, para. 235.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (May 2020).

⁴⁷² 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.B (May 29, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020).

⁴⁷³ 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 29, 2020); FSA Notice CFAP-4, page 10, para.

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.

For most commodities to be eligible for CFAP there must be a price risk. As noted above, however, for livestock it is somewhat different.⁴⁷⁴ Only livestock that were sold between January 15, 2020 and April 15, 2020 must be unpriced or subject to price risk.⁴⁷⁵

The steps for livestock payment calculations are outlined below.⁴⁷⁶

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.⁴⁷⁷ These steps should be followed for each species and class of eligible livestock.

Step One: Determine the number of eligible unpriced livestock—by species and class—that were sold between January 15, 2020, and April 15, 2020.⁴⁷⁸ This number should include any offspring from that inventory that were born before April 15, 2020.⁴⁷⁹

4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “How are payments determined?” (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴⁷⁴ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.2, “Unpriced”); CFAP Handbook, page 6-22, para. 177.A, page 6-24, para. 178.A (May 29, 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?” (June 9, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020); CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (prefatory comments).

⁴⁷⁵ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)). A USDA FAQ released prior to the publication of the June 12, 2020 rule does not reflect the changes to the price risk requirements for livestock. See USDA, Coronavirus Food Assistance Program FAQ, “Can a producer get assistance if he/she didn’t sell calves between January and April?” (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴⁷⁶ For examples of how CFAP livestock payments are calculated, see CFAP Handbook, pages 6-46 through 6-49, para. 188.C (May 29, 2020).

⁴⁷⁷ 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 29, 2020).

⁴⁷⁸ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (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). The prior rule did not specify that the livestock must be unpriced. See 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)).

⁴⁷⁹ CFAP Handbook, page 6-45, para. 188.B (May 29, 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).

Step Two: Multiply the result of Step One by the pre-set CARES Act payment rate for that species.⁴⁸⁰ 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.⁴⁸¹ These steps should be followed for each species and class of eligible livestock.

Step One: Determine the largest number of livestock in inventory—by species and class—that the farmer owned between April 16, 2020, and May 14, 2020.⁴⁸²

Step Two: Multiply the result of Step Three by the pre-set CCC payment rate for that species.⁴⁸³ 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.⁴⁸⁴

4. Calculating Dairy Payments

CFAP payments for dairy losses are based upon the market decline of the all milk price during the first quarter of 2020 as well as market channel disruptions due to COVID-19.⁴⁸⁵ A farmer's CFAP payment for dairy losses is calculated based upon the farmer's milk production from the first quarter of 2020, meaning January, February and March

⁴⁸⁰ 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 6-45, para. 188.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020).

⁴⁸¹ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f), (h)); 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 29, 2020).

⁴⁸² CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020).

⁴⁸³ 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 6-45, para. 188.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (May 2020).

⁴⁸⁴ 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 29, 2020).

⁴⁸⁵ CFAP Handbook, page 4-1, para. 85.A (May 29, 2020).

of 2020.⁴⁸⁶ This production includes milk that was dumped.⁴⁸⁷ 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, meaning April, May, and June.⁴⁸⁸

The steps for dairy payment calculations are outlined below.⁴⁸⁹

a. CARES Act Funding Formula

The following steps are taken to figure the part of dairy payments that come from CARES Act funding.⁴⁹⁰ These steps apply to dairy operations that dissolved on or before March 31, 2020.⁴⁹¹

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.⁴⁹² 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.⁴⁹³ A new rule says that these steps apply to dairy operations that

⁴⁸⁶ 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 29, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴⁸⁷ CFAP Handbook, page 4-31, para. 96.B (May 29, 2020); USDA, Coronavirus Food Assistance Program FAQ, "If a dairy producer had to dump milk, will his/her dumped milk be covered?" (June 9, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (May 2020).

⁴⁸⁸ 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 29, 2020). For the definition of second quarter, see CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, "Second quarter").

⁴⁸⁹ For examples of how CFAP dairy payments are calculated, see CFAP Handbook, pages 4-72 through 4-74, para. 111.C (May 29, 2020).

⁴⁹⁰ 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 29, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (June 9, 2020).

⁴⁹¹ CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(e)(3)).

⁴⁹² 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 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (May 2020).

⁴⁹³ 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 29, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20,

dissolved or will dissolve after March 31, 2020, but the payment will be prorated for the number of days that the operation commercially markets milk in the second quarter of 2020.⁴⁹⁴

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 1.014.⁴⁹⁵ 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.⁴⁹⁶ 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.⁴⁹⁷

5. Calculating Wool Payments

In general, CFAP payments for wool are based on a farmer's unpriced inventory as of January 15, 2020.⁴⁹⁸ 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, 2020.⁴⁹⁹ 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).⁵⁰⁰

2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁴⁹⁴ CFAP Rule Correction, 85 Fed. Reg. 35799, 35800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(e)(3)). It is unclear exactly how USDA intends to prorate the calculated payment for dairy operations that dissolved or will dissolve after March 31, 2020.

⁴⁹⁵ CFAP Rule, 85 Fed. Reg. 30825, 30826 (May 21, 2020) (prefatory comments); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (May 2020).

⁴⁹⁶ 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 4-71, para. 111.A (May 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (May 2020).

⁴⁹⁷ 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 29, 2020).

⁴⁹⁸ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, "Unpriced"); 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).

⁴⁹⁹ CFAP Rule Correction, 85 Fed. Reg. 35799, 35799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, "Unpriced"); 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 29, 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?" (June 9, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020). For examples of forward contracts, see CFAP Handbook, pages 5-33 through 5-36, para. 141.D (May 29, 2020).

⁵⁰⁰ CFAP Handbook, page 5-22, para. 137.B (May 29, 2020).

a. CARES Act Funding Formula

The following steps are taken to figure the part of wool payments that come from CARES Act funding.⁵⁰¹

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.⁵⁰²

Step Two: Multiply the result of Step One by the pre-set CARES Act payment rate.⁵⁰³ 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.⁵⁰⁴

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.⁵⁰⁵ 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.⁵⁰⁶

⁵⁰¹ 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 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020).

⁵⁰² CFAP Handbook, page 5-1, para. 125.B (May 29, 2020). A farmer's 2019 production of wool can include wool production from January 1, 2020 through April 15, 2020, so long as the farmer owned the sheep by January 15, 2020. See CFAP Handbook, page 5-24, para. 138.D (May 29, 2020).

⁵⁰³ 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 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020).

⁵⁰⁴ 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 29, 2020); USDA, Coronavirus Food Assistance Program for Wool Producers (May 2020).

⁵⁰⁵ 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 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (May 2020).

⁵⁰⁶ 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 29, 2020).

E. Payments Not Subject to USDA Offset

Payments received under the CFAP direct payments are not subject to USDA offset.⁵⁰⁷ This means that CFAP payments will not be withheld by USDA in order to satisfy a USDA debt.

F. Payments 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.⁵⁰⁸

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.⁵⁰⁹ 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.⁵¹⁰ Payment limitations can be complicated, as can the strategies used by farmers to limit the effect of these rules.⁵¹¹ USDA describes the payment limitation rules that apply for CFAP in detail.⁵¹²

A. General Rule—\$250,000

In general, no person may receive more than 250,000 dollars in CFAP payments.⁵¹³ 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.⁵¹⁴

⁵⁰⁷ 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, page 3-23, para. 65.D (May 29, 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?” (June 9, 2020), at: <https://www.farmers.gov/cfap/faq>.

⁵⁰⁸ Cite: CFAP Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(c)).

⁵⁰⁹ 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 29, 2020). This includes authorized representatives of USDA and the Government Accountability Office (GAO).

⁵¹⁰ 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 29, 2020); Notice CFAP-4, page 6, para. 3.A (May 20, 2020).

⁵¹¹ 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).

⁵¹² CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); CFAP Handbook, pages 2-3 through 2-6, para. 16 (May 29, 2020).

⁵¹³ 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 29, 2020); Notice CFAP-4, page 6, para. 3.A (May 20, 2020).

⁵¹⁴ CFAP Handbook, page 2-3, para. 16.A (May 29, 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

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.⁵¹⁵ These added amounts are possible if shareholders, 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.⁵¹⁶

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.⁵¹⁷

XI. CFAP and Appeals

Farmers have the right to appeal certain adverse decisions that USDA makes with respect to CFAP.⁵¹⁸ USDA programs, including CFAP, are required to inform farmers, in writing, of any adverse decision that is made with respect to the farmer.⁵¹⁹ This adverse decision letter should explain the reasons for the adverse decision and it also should provide the farmer with details on how to appeal the decision.⁵²⁰ There are multiple options for appealing to USDA—some options are informal, while others follow a more formal appeals process.

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.

⁵¹⁵ 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 29, 2020); Notice CFAP-4, page 6, para. 3.B (May 20, 2020). For a corporate entity with one shareholder who contributes substantial labor or 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.

⁵¹⁶ 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 29, 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.

⁵¹⁷ 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.

⁵¹⁸ 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 29, 2020). The appeal regulations that apply to CFAP are found at 7 C.F.R. pts. 11 and 780.

⁵¹⁹ 7 C.F.R. § 11.6(b) (2020); FSA Handbook, 1-APP, page 2-8, para. 12.A (September 12, 2016).

⁵²⁰ 7 C.F.R. § 11.6(b) (2020); FSA Handbook, 1-APP, page 2-8, para. 12.A, pages 2-12 through 2-15, para. 14 (September 12, 2016). The letter should provide: (1) a background explaining the reason for the

The following sections describe what type of decisions are appealable, as well as the various options that a farmer has for appealing an adverse decision.

A. Appealable Adverse Decisions

In general, only adverse decisions are appealable.⁵²¹ Adverse decisions are decisions that result either in a farmer not receiving program benefits for which the farmer believes he or she was entitled to receive, or decisions that result in a farmer receiving fewer funds than the farmer believes should have been paid.⁵²²

There are three main types of USDA adverse decisions that are appealable and that apply to CFAP. First, a farmer can appeal the denial of participation in certain programs, including CFAP.⁵²³ Second, a farmer can appeal a decision related to the farmer's compliance with a program's requirements.⁵²⁴ Third, a farmer can appeal a decision related to a program's payments or benefits.⁵²⁵ With respect to CFAP specifically, a farmer is also entitled to an appeal if FSA adjusts or disapproves any of the information on the farmer's CFAP application.⁵²⁶

In order for any of these types of decisions to be appealable, it must result in an individual determination for the farmer.⁵²⁷ In other words, the decision has to relate specifically to the farmer and not be a decision that is generally applicable to other farmers.⁵²⁸ Under CFAP, for example, if USDA decided that the production listed by the farmer on the CFAP application was not accurate, that is an appealable decision. On the other hand, the decision by USDA not to include bison as an eligible commodity is not appealable by a farmer that raises bison because the decision by USDA applies to all farmers, and not just that single farmer owning bison.

B. Non-Appealable Decisions

There are several types of decisions that are not appealable. For example, as mentioned above, a decision that is generally applicable to similarly-situated farmers is not appealable.⁵²⁹ For example, a farmer cannot appeal how a program defines eligible crops, prices, or sign-up deadlines, because such decisions apply to all farmers who apply for the

letter; (2) the general program rules; (3) FSA findings about the facts and evidence used; (4) an explanation of how the facts fit the program rules; and (5) the FSA decision.

⁵²¹ FSA Handbook, 1-APP, page 2-6, para. 11.A (September 12, 2016).

⁵²² 7 C.F.R. § 780.2, "Adverse decision" (2020).

⁵²³ 7 C.F.R. § 780.4(b)(1) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016). See also 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 29, 2020).

⁵²⁴ 7 C.F.R. § 780.4(b)(2) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016).

⁵²⁵ 7 C.F.R. § 780.4(b)(3) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016).

⁵²⁶ CFAP Handbook, page 3-8, para. 51.E (May 29, 2020).

⁵²⁷ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

⁵²⁸ 7 C.F.R. § 780.5(a)(1) (2020); FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

⁵²⁹ 7 C.F.R. § 780.5(a)(1) (2020); CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

program.⁵³⁰ With respect to CFAP, this means a farmer cannot appeal USDA's decision to include or exclude certain commodities from eligibility.⁵³¹ It also means a farmer cannot appeal the payment rates that USDA determined for each of the CFAP-eligible commodities.

In addition, farmers cannot appeal any statutory or regulatory requirements that apply to USDA programs.⁵³² This includes statutory or regulatory formulas that are used when calculating a farmer's potential payments or benefits under a program.⁵³³

Farmers also are unable to appeal the denial of program benefits due to a lack of funding.⁵³⁴ Therefore, if CFAP funds run out, and a farmer is denied a payment for that reason, the farmer cannot appeal the denial.

Finally, the USDA appeals process does not allow for appeals that relate to discrimination.⁵³⁵ If a farmer has a discrimination issue to raise, the farmer must follow the USDA discrimination complaint process, which is described below.

C. Overview of Appeals Process and Options

In general, there are five main avenues that a farmer can take to appeal an adverse decision by USDA: (1) mediation; (2) reconsideration; (3) appealing to the FSA county committee; (4) appealing to the FSA state committee; and (5) appealing to the National Appeals Division (NAD) of USDA. In many cases, a farmer may take advantage of more than one appeals option. An overview of each of these appeals options is described in the sections that follow.

1. Request Mediation

If a farmer has been subject to an adverse decision, the farmer may request a mediation of that decision.⁵³⁶ Mediation is an informal appeals process, and the farmer may be required to pay for the cost of the mediation. To request mediation, the farmer must make a written request for reconsideration within thirty calendar days of when the farmer received the written adverse determination. A farmer may only mediate the same adverse decision once.⁵³⁷

A farmer cannot request mediation if the farmer first seeks to appeal the decision through NAD.⁵³⁸

⁵³⁰ FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

⁵³¹ CFAP Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments).

⁵³² 7 C.F.R. § 780.5(a)(1) (2020); FSA Handbook, 1-APP, page 2-6, para. 11.A (September 12, 2016).

⁵³³ 7 C.F.R. § 780.5(a)(2) (2020); FSA Handbook, 1-APP, page 2-6, para. 11.A (September 12, 2016).

⁵³⁴ 7 C.F.R. § 780.5(a)(7) (2020); FSA Handbook, 1-APP, page 2-6, para. 11.A (September 12, 2016).

⁵³⁵ FSA Handbook, 1-APP, page 2-50, para. 27.A, page 6-3, para. 72.B (September 12, 2016).

⁵³⁶ 7 C.F.R. § 780.9 (2020); FSA Handbook, 1-APP, page 2-14, para. 14.E (September 12, 2016).

⁵³⁷ 7 C.F.R. § 780.9(b) (2020).

⁵³⁸ 7 C.F.R. § 780.7(a) (2020).

2. Request Reconsideration

If a farmer has been subject to an adverse decision, the farmer may request reconsideration of that decision.⁵³⁹ To do so, the farmer must make a written request for reconsideration within thirty calendar days of when the farmer received the written adverse determination. The request should explain why the farmer believes FSA's decision was in error. If a farmer requests reconsideration, the farmer is entitled to have an informal hearing, either in person or over the telephone.

A farmer cannot request reconsideration if the farmer first seeks an appeal through any of the other four appeals avenues.⁵⁴⁰

3. Appeal to FSA County Committee

If a farmer has been subject to an adverse decision, the farmer may appeal to the farmer's local FSA county committee.⁵⁴¹ To do so, the farmer must write a letter to the county committee within thirty calendar days of receiving the adverse decision. The letter must explain why the farmer believes the committee's decision was in error. Under this type of appeal, the farmer would have a right to an informal hearing. If the farmer does not prevail on this appeal, the farmer can still appeal to the state committee or NAD.

4. Appeal to FSA State Committee

If a farmer has been subject to an adverse decision, the farmer may appeal to the farmer's state FSA committee, so long as the farmer has not already appealed to NAD.⁵⁴² To appeal to the state committee, the farmer must write a letter to the state committee within thirty calendar days of receiving the adverse decision. The letter must explain why the farmer believes the committee's decision was in error.

If the farmer does not prevail on an appeal to the state committee, the farmer can still request mediation (if the farmer has not already) or appeal to NAD.⁵⁴³ The farmer may not, however, appeal to the county committee after having appealed to the state committee.

5. Appeal to National Appeals Division (NAD)

If a farmer has been subject to an adverse decision, the farmer may appeal to the National Appeals Division (NAD) of USDA.⁵⁴⁴ Although NAD is an organization within

⁵³⁹ 7 C.F.R. § 780.7 (2020); FSA Handbook, 1-APP, page 2-13, para. 14.C (September 12, 2016).

⁵⁴⁰ 7 C.F.R. § 780.7(b) (2020); FSA Handbook, 1-APP, page 2-13, para. 14.C (September 12, 2016).

⁵⁴¹ 7 C.F.R. § 780.8 (2020); FSA Handbook, 1-APP, page 2-12, para. 14.B (September 12, 2016).

⁵⁴² 7 C.F.R. § 780.10 (2020); FSA Handbook, 1-APP, page 2-13, para. 14.D (September 12, 2016).

⁵⁴³ 7 C.F.R. § 780.10 (2020); FSA Handbook, 1-APP, page 2-13, para. 14.D (September 12, 2016).

⁵⁴⁴ 7 C.F.R. § 11.3 (2020); FSA Handbook, 1-APP, page 2-15, para. 14.F (September 12, 2016). 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. See also 7 C.F.R. pts. 11 and 780.

USDA, it is independent from all other offices and agencies within USDA.⁵⁴⁵ This means that NAD appeals are not handled by any of the same agencies that make the determinations for USDA programs, such as CFAP.

A NAD appeal generally begins when a farmer formally requests an appeal of an adverse decision.⁵⁴⁶ This request must be in writing. If the request for a NAD appeal is accepted, the appeal will follow a specific process that is outlined, in detail, in an FSA Handbook.⁵⁴⁷ In the typical case, there will be a pre-hearing conference, a time to submit evidence, and eventually an official hearing that can be by phone, in-person, or based only on the written record of what happened.⁵⁴⁸

A NAD appeal is the final appeal within USDA that a farmer may make.⁵⁴⁹ Once a NAD appeal is over, the farmer cannot later attempt to mediate or appeal to the county or state committees. A lawsuit, however, may still be possible.

XII. Discrimination is Illegal: Filing a Complaint Against USDA

By law, USDA is prohibited from discriminating against the farmers it serves.⁵⁵⁰ USDA allows farmers and others to file discrimination complaints. The Office of the Assistant Secretary for Civil Rights (OASCR) is responsible for investigating farmer discrimination complaints.

A. The Bases of Illegal Discrimination

USDA is prohibited from subjecting any person to discrimination.

USDA says USDA discrimination is prohibited if it is based on race, color, religion, sex, age, national origin, marital status, sexual orientation, familial status, disability, limited English proficiency, or because all or part of an individual's income comes from a public assistance program.⁵⁵¹ USDA regulations add to that list parental status, political beliefs, and gender identity.⁵⁵² USDA regulations say discrimination means the unlawful treatment or denial of benefits, services, rights or privileges.⁵⁵³ Discrimination can mean being excluded from participation in programs or denial of benefits.

⁵⁴⁵ 7 C.F.R. § 11.2(a) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016).

⁵⁴⁶ 7 C.F.R. § 11.6(b) (2020); FSA Handbook, 1-APP, page 6-7, para. 74.A (September 12, 2016).

⁵⁴⁷ For more details on how a NAD appeal works, see FSA Handbook, 1-APP, pt. 6 (September 12, 2016).

⁵⁴⁸ FSA Handbook, 1-APP, page 6-41, para. 81.A, page 6-57, para. 88.B (September 12, 2016).

⁵⁴⁹ 7 C.F.R. § 11.3 (2020); FSA Handbook, 1-APP, page 2-15, para. 14.F (September 12, 2016).

⁵⁵⁰ As USDA put it, "USDA prohibits discrimination against its customers." Filing a Program Discrimination Complaints as a USDA Customer, at <https://www.ascr.usda.gov/filing-program-discrimination-complaint-usda-customer> (June 15, 2020).

⁵⁵¹ USDA OASCR, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020); USDA, Departmental Regulation no. 4330-003, Nondiscrimination in USDA-Conducted Programs and Activities § 5(j) (October 5, 2015), at <https://www.ocio.usda.gov/sites/default/files/docs/2012/DR%204330-003%20Nondiscrimination%20in%20USDA%20Conducted%20Programs%20and%20Activities.pdf>.

⁵⁵² 7 C.F.R. §§ 15d.2, "Discrimination," 15d.3(a) (2020); USDA Complaint Form, AD-3027 (January 19, 2012). Political beliefs and gender identity have been a part of USDA regulations since 2014. See 79 Fed. Reg. 41406 (July 16, 2014) (codified at 7 C.F.R. part 15d).

⁵⁵³ 7 C.F.R. § 15d.3(a) (2020).

B. Right to File a Complaint

If someone feels they have been discriminated against by USDA for any of the above reasons, the person may file a discrimination complaint with the USDA Office of the Assistant Secretary for Civil Rights (OASCR).⁵⁵⁴

C. Discrimination Complaint Form

USDA has a discrimination complaint form.⁵⁵⁵ The complaint form is available online.⁵⁵⁶ Farmers may also get a copy of the form by sending an email to USDA.⁵⁵⁷ Otherwise, farmers may write USDA to get a copy of the form.⁵⁵⁸

Alternatively, farmers can write a letter instead of using the official USDA complaint form.⁵⁵⁹ The letter needs to have all of the information that is requested on the complaint form, including information on when the discrimination took place, who discriminated against the farmer and how, and the basis of the discrimination (race, color, religion, sex, age, etc).⁵⁶⁰ Regardless of whether a farmer uses the official form or writes a letter, the complaint needs to describe the discrimination in enough detail for investigators to understand the nature and date of the discrimination.⁵⁶¹ Either the farmer or an authorized representative must sign the form or letter.

D. Filing a Complaint

To file a complaint, a person can use one of several methods.⁵⁶² If the complaint goes to the wrong agency, the agency should forward it to OASCR.⁵⁶³

1. Mail

A farmer can mail the complaint to USDA at this address:⁵⁶⁴

⁵⁵⁴ USDA, Nondiscrimination Regulation § 7(a)(1) (October 5, 2015). See USDA OASCR, How to File a Program Discrimination Complaint, at: <https://www.ascr.usda.gov/node/119> (June 15, 2020).

⁵⁵⁵ The complaint is form AD-3027, USDA Program Discrimination Complaint Form.

⁵⁵⁶ USDA, Program Discrimination Complaint Form, AD-3027 (January 19, 2012), at https://www.ascr.usda.gov/sites/default/files/Complain_combined_6_8_12_508_0.pdf

⁵⁵⁷ To receive a complaint form by email, send a request to SM.OASCR.Info.

⁵⁵⁸ Written requests for the USDA Program Discrimination Complaint Form can be mailed to:
U.S. Department of Agriculture
Director, Center for Civil Rights Enforcement
1400 Independence Avenue, SW
Washington, DC 20250-9410

⁵⁵⁹ 7 C.F.R. § 15d.2, "Complaint" (2020); USDA OASCR, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020); USDA OASCR, Program Discrimination Complaint Filing: Frequently Asked Questions (June 15, 2020), at: <https://www.ascr.usda.gov/program-discrimination-complaint-filing>.

⁵⁶⁰ USDA Complaint Form, AD-3027 (January 19, 2012).

⁵⁶¹ 7 C.F.R. § 15d.2, "Complaint" (2020); For specific details on what to include in the letter, see USDA OASCR, How to File a Program Discrimination Complaint (June 15, 2020); USDA, Nondiscrimination Regulation § 5(f), "Complaint" (October 5, 2015).

⁵⁶² USDA, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020).

⁵⁶³ USDA, Nondiscrimination Regulation § 7(a)(3) (October 5, 2015).

⁵⁶⁴ USDA OASCR, How to File a Program Discrimination Complaint; USDA, Program Discrimination Complaint Filing: Frequently Asked Questions (June 15, 2020).

U.S. Department of Agriculture
 Director, Center for Civil Rights Enforcement
 1400 Independence Avenue, SW
 Washington, DC 20250-9410

2. Fax

The complaint can be faxed to USDA at: (202) 690-7442.⁵⁶⁵

3. Email—With Signed Complaint Attached

Farmers may use email to send in a complaint, but it should have as an attachment a signed copy of the complaint.⁵⁶⁶

E. Help with the Discrimination Complaint Form

USDA says that for help filling out the discrimination complaint form, and for further information on filing a discrimination complaint, farmers can contact USDA.⁵⁶⁷ Calls can be made to the following numbers:

Local: (202) 260-1026
 Toll Free: (866) 632-9992
 Local or Federal Relay: (800) 877-8339
 Relay Voice User: (866) 377-8642

People who are deaf, hard of hearing, or have speech disabilities, may contact USDA through the Federal Relay Service at (800) 877-8338 or (800) 845-6136 (Spanish).⁵⁶⁸

USDA says that persons with disabilities who require alternative means of communication of program information (Braille, large print, audiotope, etc.) should contact USDA's TARGET Center at (202)720-2600.⁵⁶⁹

Farmers also can email USDA for help at CR-INFO@ascr.usda.gov.

⁵⁶⁵ For specific details on what to include in the letter, see USDA OASCR, How to File a Program Discrimination Complaint (June 15, 2020), at: <https://www.ascr.usda.gov/node/119>.

⁵⁶⁶ USDA Complaint Form, AD-3027 (January 19, 2012). Use the following email address: program.intake@usda.gov. At one point on the USDA website, USDA says that a complaint can be filed using email. USDA OASCR, How to File a Program Discrimination Complaint (June 15, 2020). Also on the website, however, USDA says that a program discrimination complaint may not be sent by email. USDA, Program Discrimination Complaint Filing: Frequently Asked Questions (June 15, 2020).

⁵⁶⁷ USDA, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020); USDA, Program Discrimination Complaint Filing: Frequently Asked Questions (June 15, 2020).

⁵⁶⁸ USDA, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020).

⁵⁶⁹ USDA, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020).

F. Deadline to File a Discrimination Claim: 180 Days

Any discrimination complaint against USDA must be filed within 180 days of when the person complaining knew or should have known of the discrimination.⁵⁷⁰ It is possible to receive a waiver of this 180-day requirement if: (1) the discriminatory act could not reasonably have been expected to be known within 180 days; (2) illness or incapacitation prevented the filing of the complaint within 180 days; (3) the same complaint was filed with another Federal, state, or local agency; or (4) any other reason allowed by the Director of the Center for Civil Rights Enforcement.⁵⁷¹

G. USDA Responses to Discrimination Complaints

After receiving the complaint, USDA says it will first decide if the complaint meets the legal requirements for processing.⁵⁷² It is possible USDA will ask the farmer for more information.⁵⁷³ If so, the farmer has thirty days to respond, although the farmer may ask for more time.⁵⁷⁴ If USDA decides the complaint is not to be accepted, USDA should send a letter to the farmer explaining why.

If USDA accepts the complaint, USDA will send a letter letting the farmer know this has happened, and that the complaint will be investigated.⁵⁷⁵ The USDA agency that is the basis of the discrimination complaint will write a response to the complaint. USDA will assign an investigator. The investigator will contact those involved, and get statements and documents relating to the complaint. The investigator will write a report about the investigation.⁵⁷⁶ According to USDA, a complaint investigation is an impartial process designed to obtain the facts and evidence relevant to whether there was discrimination.⁵⁷⁷

USDA will then analyze the complaint and the report to reach a final decision on the complaint.⁵⁷⁸ The decision should include an analysis of the claims and whether discrimination was found. USDA may conclude that the local USDA agency has adequately corrected the discrimination.⁵⁷⁹

If discrimination was found, USDA may try to settle the complaint and may take other corrective action.⁵⁸⁰ If not, discrimination is found the case is closed. The final decision will be mailed to the farmer.

⁵⁷⁰ 7 C.F.R. § 15d.5(a) (2020); USDA, Filing a Discrimination Complaint (June 15, 2020); USDA Program Discrimination Complaint Filing: Frequently Asked Questions (June 15, 2020); USDA Complaint Form, AD-3027 (January 19, 2012); USDA, Nondiscrimination Regulation § 7(b)(1) (October 5, 2015).

⁵⁷¹ See USDA OASCR, How to File a Program Discrimination Complaint (June 15, 2020); USDA, Nondiscrimination Regulation § 7(b)(2) (October 5, 2015).

⁵⁷² USDA, How to File a Discrimination Complaint (June 15, 2020); USDA, Nondiscrimination Regulation § 7(c)(1)-(2) (October 5, 2015).

⁵⁷³ USDA, Nondiscrimination Regulation § 7(c)(2) (October 5, 2015).

⁵⁷⁴ USDA, Nondiscrimination Regulation § 7(c)(4) (October 5, 2015).

⁵⁷⁵ USDA, Filing a Program Discrimination Complaint as a USDA Customer; 7 C.F.R. 15d.5(b)(2020); USDA, Nondiscrimination Regulation § 7(c)(6) (October 5, 2015).

⁵⁷⁶ The Report of Investigation will be available to the farmer through the Freedom of Information Act.

⁵⁷⁷ USDA, Nondiscrimination Regulation § 5(g), "Complaint Investigation" (October 5, 2015).

⁵⁷⁸ USDA, Nondiscrimination Regulation §§ 5(k), "Final Agency Decision," 7(f) (October 5, 2015).

⁵⁷⁹ USDA, Nondiscrimination Regulation § 7(f) (October 5, 2015).

⁵⁸⁰ USDA, Nondiscrimination Regulation §§ 5(l), "Settlement Agreement," 7(f) (October 5, 2015).

H. Mediation

Along the way, USDA may offer mediation to the farmer.⁵⁸¹

I. Disability Claims Somewhat Different

Claims of discrimination based on disability operate under somewhat different rules.⁵⁸²

J. Checking the Status of a complaint

Farmers may check the status of a complaint by using the same contact information that is listed above.⁵⁸³

K. Reprisals

USDA is not allowed to subject a person to reprisal for filing a complaint or opposing a discriminatory practice.⁵⁸⁴ That means USDA may not intimidate, threaten, harass, coerce, discriminate against, or otherwise retaliate against that person.⁵⁸⁵

L. USDA Reporting on Discrimination Complaints

The 2008 Farm Bill required USDA to report on civil rights matters.⁵⁸⁶ USDA rules give responsibility for those reporting requirements to OASCR.⁵⁸⁷ USDA is required to report every year on discrimination complaints for each USDA agency. The report should describe, among other things: (1) the number of program complaints filed (this means farmer complaints, not employee complaints); (2) the time it took to process each complaint; and (3) the number of complaints that resulted in a finding of discrimination.⁵⁸⁸ Congress directed USDA to send the report to Congress and to make it available to the public on the USDA website. USDA regulations say that the responsibility for making these reports goes to the OASCR.

A USDA website includes these reports, but the last report included is for fiscal year 2017. Written testimony by the Deputy Assistant Secretary for Civil Rights in November 2019 also did not include information regarding the timeliness or effectiveness of civil rights complaints field by farmers.⁵⁸⁹

⁵⁸¹ USDA, Nondiscrimination Regulation § 7(d) (October 5, 2015).

⁵⁸² USDA, Nondiscrimination Regulation, § 7(f), (i) (October 5, 2015).

⁵⁸³ USDA, Program Discrimination Complaint Filing: Frequently Asked Questions (June 15, 2020).

⁵⁸⁴ 7 C.F.R. § 15d(3)(b) (2020)

⁵⁸⁵ USDA Complaint Form, AD-3027 (January 19, 2012).

⁵⁸⁶ Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, section 14007 (codified at 7 U.S.C. § 2279-2).

⁵⁸⁷ 7 C.F.R. §§ 2.25(a)(22), 15d.4(c) (2020).

⁵⁸⁸ 7 C.F.R. § 15d.4(b) (2020); Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, section 14007 (codified at 7 U.S.C. § 2279-2). The number of personnel actions taken as a result should also be reported.

⁵⁸⁹ Testimony, Statement of Naomi C. Earp, House Agriculture Committee, Subcommittee on Nutrition, Oversight, and Department Operations, House of Representatives (November 19, 2019), at: <https://agriculture.house.gov/uploadedfiles/hhrg-116-ag03-wstate-earpn-20191119.pdf>. The testimony mentions employee civil rights complaints. It does not address program complaints, the term used by USDA to describe farmer complaints.

It appears that the last report was for the fiscal year 2016 and was completed in April 2017.⁵⁹⁰ The end of the fiscal year for 2016 was September 30, 2016. At the end of fiscal year 2016 there were 549 outstanding program discrimination complaints at USDA agencies. Of these 111 were from the Farm Service Agency (FSA) and therefore would be mainly farmer complaints. The average “age of inventory” is also part of the report. At the end of fiscal year 2016 the average program civil rights case had been outstanding for 780 days. The average FSA discrimination complaint had been outstanding for 1249 days. In fiscal year 2016 248 complaints were closed by USDA. Among them were four cases in which there was a finding of discrimination. For FSA, there were twenty-seven cases closed and one finding of discrimination.

As noted above, these statistics are from fiscal year 2016, and were reported in April 2017. There have been no reports for more than three years, although the reports are required by law to be filed each year.⁵⁹¹

After a congressional hearing that took place on November 19, 2019, and in response to written congressional questions, OASCR staff said that between fiscal year 2018 and fiscal year 2019 the number of program complaints—presumably for the whole Department of Agriculture—decreased from 405 to 355.⁵⁹² During that same period, the number of days needed to investigate a program complaint decreased from 594 to 420. No other information was provided.

M. A Realistic View of the USDA Discrimination Complaint Process

On paper, and in theory, USDA has a discrimination complaint process that can work. OASCR investigates discrimination complaints filed by farmers and decides if discrimination has taken place.

In the past USDA has had a great deal of difficulty conducting timely and effective civil rights investigations.⁵⁹³ As the reports of data from 2016 show, USDA is having a hard time keeping up with discrimination complaints and is not often finding discrimination when they are completed. The fact that USDA appears not to have met its reporting requirements is also not encouraging.

⁵⁹⁰ For the most recent report see, USDA, Report of Civil Rights Complaints, Resolutions, and Actions for Fiscal year 2016, page 1, 3,9-11 (April 2017), at:

https://www.ascr.usda.gov/sites/default/files/508_Consolidated2016%20FarmBill%20Report_4-26-2017_Final.pdf. This and previous reports can be found at USDA, Reports of Civil Rights, Resolutions, and Actions, at: <https://www.ascr.usda.gov/reports> (June 15, 2020).

⁵⁹¹ For the requirement, see Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, §§ 14007, 14010 (codified at 7 U.S.C. § 2279-2); see also 7 C.F.R. § 15d.4(c) (2020).

⁵⁹² Review of the Office of the Assistant Secretary for Civil Rights, Hearing Before the Subcommittee on Nutrition, Oversight, and Department Operations, Committee of Agriculture, House of Representatives, 116th Cong., Serial No. 116-25, at 33 (2019), at <https://agriculture.house.gov/calendar/eventsingle.aspx?EventID=1380>.

⁵⁹³ See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

N. Lawsuit Also Possible: Beware of Statue of Limitations

Filing a federal lawsuit is also possible.⁵⁹⁴ There can be strict deadlines based on what is called the statute of limitations for a discrimination lawsuit. In addition, once a federal lawsuit is filed, USDA will close the discrimination complaint claim that is about the same issue as the lawsuit.⁵⁹⁵

⁵⁹⁴ USDA, Nondiscrimination Regulation § 7(a)(4), “Complaint Investigation” (October 5, 2015).

⁵⁹⁵ USDA, Nondiscrimination Regulation § 7(a)(4), “Complaint Investigation” (October 5, 2015).

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.⁵⁹⁶ 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.⁵⁹⁷ 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.⁵⁹⁸ 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.⁵⁹⁹

On May 8, 2020, AMS published the list of contract award recipients, amounting to a total of roughly 1.2 billion dollars.⁶⁰⁰ It is unknown whether AMS will release a second round of RFPs for the program.

⁵⁹⁶ 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>.

⁵⁹⁷ The RFP is available on the AMS website, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

⁵⁹⁸ 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>.

⁵⁹⁹ See Request for Proposals Frequently Asked Questions, at: <https://www.ams.usda.gov/publications/content/request-proposals-frequently-asked-questions>.

⁶⁰⁰ 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.⁶⁰¹ 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.⁶⁰²

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.⁶⁰³ 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.⁶⁰⁴ Indian tribal organizations qualify as government entities, and are eligible as well.⁶⁰⁵

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, 2020.⁶⁰⁶ 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.⁶⁰⁷

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,

⁶⁰¹ 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>.

⁶⁰² See Farmers to Families Food Box Program FAQs.

⁶⁰³ See Farmers to Families Food Box Program FAQs.

⁶⁰⁴ 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>.

⁶⁰⁵ See Farmers to Families Food Box Program FAQs.

⁶⁰⁶ See Request for Proposals Frequently Asked Questions, at:; see also RFP—ERAcquisition (pdf), page 6.

⁶⁰⁷ 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.⁶⁰⁸

⁶⁰⁸ See AMS, USDA Farmers to Families Food Box, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.