

# Farmers' Guide to Coronavirus Food Assistance Program 1 (CFAP 1)

## Third Edition

October 23, 2020

The name of this Guide was updated in November 2020 to **CFAP 1** to distinguish it from the newly created CFAP 2 program.

**Farmer Legal Assistance Hotline**  
**877-860-4349**

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Farmers' Legal Action Group

# **Farmers' Guide to Coronavirus Food Assistance Program 1 (CFAP 1)**

## **Third Edition**

October 23, 2020

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This Guide, and any update to it, is available at: <http://www.flaginc.org/covid-19-guide/>.

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## Chapter One: Introduction

This Third 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 CFAP for short) and the Farmers to Families Food Box Program.<sup>1</sup>

### I. Agricultural Relief Programs Under the CARES Act

The CARES Act devoted significant resources to agriculture.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> This money was not available to the CCC until after June 2020.<sup>5</sup> The Act did not say how the money must be spent. The CCC is often used to support farmers with loans and purchases and payments.<sup>6</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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>.

<sup>4</sup> CARES Act, § 11002.

<sup>5</sup> CARES Act, § 11002; Coronavirus Food Assistance Program, CFAP Rule, 85 Fed. Reg. 30,825, 30,825, 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>.

<sup>6</sup> 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. 30,825, 30,825 (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](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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

## **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.<sup>10</sup>

Under the umbrella of CFAP are two separate programs.<sup>11</sup> 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.

On September 22, 2020, a rule published in the Federal Register outlined a new CFAP program, which USDA is calling “CFAP 2.”<sup>12</sup> Although both programs have essentially the same name, CFAP 2 is drastically different from the original CFAP direct payments program. This can cause much confusion. To be clear, this Guide only addresses the first CFAP and does not include any information on CFAP 2.

### **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.<sup>13</sup>

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<sup>7</sup> CARES Act, Division B, Title 1. USDA describes its understanding of CARES Act funding and its purpose at CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments).

<sup>8</sup> CARES Act, Division B, Title 1.

<sup>9</sup> 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>.

<sup>10</sup> Press Release, USDA Announces Coronavirus Food Assistance Program (April 17, 2020).

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

<sup>12</sup> Coronavirus Food Assistance Program, CFAP2 Rule, 85 Fed. Reg. 59,380 Final Rule (September 22, 2020) (prefatory comments) (to be codified at 7 C.F.R. part 9), at: <https://www.govinfo.gov/content/pkg/FR-2020-09-22/pdf/2020-20844.pdf>.

<sup>13</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments).

About 16 billion dollars in total may be spent through CFAP for direct farmer payments.<sup>14</sup> 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 to prevent, prepare for, and respond to COVID-19. The additional 6.5 billion dollars will come from existing CCC funds.<sup>15</sup>

## **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.<sup>16</sup> The food results in boxes of fresh produce, dairy and meat that is distributed through food banks, community and faith-based organizations, and other nonprofits to those in need.<sup>17</sup>

## **II. Current Through September 17, 2020**

This Third Edition of the CFAP Guide is current through September 17, 2020. The First Edition was published on May 29, 2020. The Second Edition was published on June 17, 2020.

For most farmers, September 11, 2020, was the deadline to sign up for CFAP. There are exceptions to the deadline for a few narrow reasons—including natural disasters.

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<sup>14</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (to be codified at 7 C.F.R. § 9.5(k)); Press Release, USDA Announces Coronavirus Food Assistance Program (April 17, 2020).

<sup>15</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (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. 30,825, 30,825 (May 21, 2020) (prefatory comments).

<sup>16</sup> USDA, Farmers to Families Food Box (September 17, 2020), at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

<sup>17</sup> For details on the Farmers to Families Food Box Program, see USDA, Farmers to Food Box Program. 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

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.<sup>18</sup> 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.<sup>19</sup>

### II. Authority and Rules for CFAP Direct Payments Program

CFAP direct payments are implemented by the USDA Farm Service Agency (FSA).<sup>20</sup> The USDA's Agricultural Marketing Service (AMS) assists 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.<sup>21</sup> This includes specialty crops that were shipped but spoiled and no payment was received.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> In general, CCC authority is very broad. USDA says it is using CCC money to partially compensate farmers for increased marketing costs and the disposal of surplus commodities.<sup>25</sup>

<sup>18</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments).

<sup>19</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments).

<sup>20</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments).

<sup>21</sup> 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 (September 17, 2020), at: <https://www.farmers.gov/cfap>.

<sup>22</sup> CARES Act, Division B—Emergency Appropriations for Coronavirus Health Response and Agency Operations, Title I, Agricultural Programs, Office of the Secretary.

<sup>23</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments).

<sup>24</sup> 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>.

<sup>25</sup> USDA relies on 15 U.S.C. § 714b of the CCC charter for authority to create the CFAP program. CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (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 is tracking funds from CARES Act and CCC Charter Act separately.<sup>26</sup>

## **B. USDA Regulations**

Regulations for CFAP can be found in a final rule that appeared in the Federal Register on May 21, 2020.<sup>27</sup> Those regulations will eventually become a part of the Code of Federal Regulations.<sup>28</sup> USDA issued a version of the regulations before they appeared in the Federal Register.<sup>29</sup> Several corrected CFAP rules have also been published in the Federal Register.<sup>30</sup>

## **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 five significant amendments to the Handbook.<sup>31</sup> FSA has also relied on other Handbooks to set part of the CFAP rules.<sup>32</sup>

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Fed. Reg. 30,825, 30,825 (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.

<sup>26</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments).

<sup>27</sup> CFAP Rule, 85 Fed. Reg. 30,825 (May 21, 2020) (to be codified at 7 C.F.R. pt. 9).

<sup>28</sup> CFAP regulations will be found at 7 C.F.R. Part 9.

<sup>29</sup> 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. 30,825 (May 21, 2020).

<sup>30</sup> See, for example, Coronavirus Food Assistance Program; Correction (Fourth CFAP Rule Correction), 85 Fed. Reg. 59,174 (September 21, 2020); Coronavirus Food Assistance Program; Correction (Third CFAP Rule Correction), 85 Fed. Reg. 49,593 (August 14, 2020); Coronavirus Food Assistance Program; Correction (Second CFAP Rule Correction), 85 Fed. Reg. 41,328 (July 10, 2020); Coronavirus Food Assistance Program; Correction (First CFAP Rule Correction), 85 Fed. Reg. 35,799 (June 12, 2020).

<sup>31</sup> See FSA Handbook, 1-CFAP, Coronavirus Food Assistance Program (Amendment 6) (September 15, 2020), at [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a06.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a06.pdf); FSA Handbook, 1-CFAP, Coronavirus Food Assistance Program (Amendment 5) (August 14, 2020), at [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a05.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a05.pdf); FSA Handbook, 1-CFAP, Coronavirus Food Assistance Program (Amendment 4) (August 6, 2020), at [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a04.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a04.pdf); FSA Handbook, 1-CP, Coronavirus Food Assistance Program (Amendment 3) (June 24, 2020), at [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a03.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a03.pdf); 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](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a02.pdf); 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](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a01.pdf).

<sup>32</sup> 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>.

## 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.<sup>33</sup> This Guide includes Notices released to the public by USDA through September 9, 2020.

## E. Other USDA Information

USDA sometimes sets policy for CFAP and other programs through the USDA website.<sup>34</sup> Because USDA's Farm Service Agency (FSA) has been designated to run CFAP, some of this information is likely to be posted by FSA.<sup>35</sup>

## 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

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.

<sup>33</sup> See, for example, FSA Notice CFAP-9, "CFAP Application Deadline" (September 9, 2020); 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>.

<sup>34</sup> See, for example, Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1>; Coronavirus and USDA Assistance to Farmers (September 17, 2020), at: <https://www.farmers.gov/coronavirus>; and see USDA, Coronavirus Food Assistance Program FAQ (September 29, 2020), at <https://www.farmers.gov/cfap1/faq>.

<sup>35</sup> 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>.

<sup>36</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); FSA Notice CFAP-4, page 1, para. 1.A (May 20, 2020).

<sup>37</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); FSA Notice CFAP-4, page 1, para. 1.A (May 20, 2020).

<sup>38</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments).

## IV. Farmer Eligibility

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

### A. Farmer Must be an Eligible Producer

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

#### 1. Person or Legal Entity

An eligible producer can be a natural person.<sup>39</sup> 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.<sup>40</sup>

##### (ii) Resident Alien

If the farmer is a person, the farmer can be an eligible producer if the farmer is a resident alien.<sup>41</sup> In general, that means a person must have a valid Form I-551 card.<sup>42</sup> These are commonly called Green Cards, though officially they are called Permanent Resident Cards.<sup>43</sup>

<sup>39</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Producer”); CFAP Handbook, page 2-1, para. 15.A (September 15, 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.

<sup>40</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(1)); CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

<sup>41</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(2)); CFAP Handbook, page 2-1, para. 15.A (September 15, 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. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(2)).

<sup>42</sup> CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

<sup>43</sup> USDA rules sometimes refer to Form I-551 as a Resident Alien Card. CFAP Handbook, page 2-1, para. 15.A (September 15, 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>.

### (iii) Foreign Person

A foreign person may be an eligible producer under CFAP rules.<sup>44</sup>

For the purposes of CFAP, a foreign person is defined in USDA rules and has two parts.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> Actively engaged, for this purpose, means three things, all of which must be true in order for a foreign person to qualify for CFAP. Active engagement rules are used for other purposes by FSA and are in flux.<sup>48</sup>

First, a farmer that is a foreign person under FSA rules must provide a substantial amount of active personal labor for the farm.<sup>49</sup> Active personal

<sup>44</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(6)); CFAP Handbook, page 2-1, para. 15.A (September 15, 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).

<sup>45</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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); Commodity Credit Corporation and Farm Service Agency, Payment Limitation and Payment Eligibility, 85 Fed. Reg. 52,033, 52,040 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.401(a)).

<sup>46</sup> 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>.

<sup>47</sup> FSA Payment Eligibility Handbook, 5-PL, page 3-6.5, para. 155.5.A, and page 3-7, para. 156.B (October 2, 2019); Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,040 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.401(a)).

<sup>48</sup> For a broader discussion, see Congressional Research Service, U.S. Farm Programs: Eligibility and Payment Limits, Report no. 46248 (March 2, 2020), U.S. Farm Eligibility and Payment Limits Under the 2018 Farm Bill (P.L. 15-334), Report no. 45659 (June 19, 2019), USDA’s Actively Engaged in Farming (AEF) Requirement, Report no. 4656 (March 7, 2019); Government Accountability Office, Farm Programs: Information on Payments, GAO-18-384R (May 18, 2016).

<sup>49</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); FSA Payment Eligibility Handbook, 5-PL, page 3-6.5, para. 155.5.A (October 2, 2019); Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,040 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.401(a)). 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. See CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments). 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. The 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



labor is defined by FSA, and means to personally provide physical activities needed for a farming operation.<sup>50</sup>

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

When filling out forms for CFAP, the farmer will be asked about immigration status and for a tax identification number.<sup>54</sup> 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.

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share in the farming operation. See 7 C.F.R. § 1400.3(b), “Substantial amount of active personal labor” (2020).

<sup>50</sup> Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,037 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.3(b), “Active personal labor,” “Substantial amount of active personal labor”); FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 1, “Active Personal Labor” (October 2, 2019); CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments). The definition of active personal management, which is not the same thing as active personal labor, can be found at Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,037 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.3(b), “Active personal management”).

<sup>51</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (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).

<sup>52</sup> Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,037 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.3(b), “Capital”); FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 1, “Capital” (October 2, 2019). A capital contribution 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.

<sup>53</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); FSA Payment Eligibility Handbook, 5-PL, page 3-7, para. 156.B (October 2, 2019); Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,037, 52,040 (August 24, 2020) (to be codified at 7 C.F.R. §§ 1400.3(b), “Land,” 1400.401(a)). The land can be leased from another person with a legal interest in the farm if it is leased at fair market value.

<sup>54</sup> 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>.

### **(i) Partnership**

A partnership can be an eligible producer.<sup>55</sup> All of the partners in the partnership must be citizens of the United States. A joint venture may also be eligible for CFAP.<sup>56</sup>

### **(ii) Tribe or Tribal Organization**

An eligible producer can be an Indian Tribe or a Tribal organization.<sup>57</sup>

### **(iii) Corporation and Limited Liability Company (LLC)**

An eligible producer can be a corporation as well as a limited liability company (LLC).<sup>58</sup>

### **(iv) Cooperatives**

An eligible producer, according to FSA, can include some other organizational structures that are organized under state law.<sup>59</sup> 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.<sup>60</sup>

<sup>55</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(3)); CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

<sup>56</sup> See CFAP Rule, 85 Fed. Reg. 30,825, 30,839 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1)).

<sup>57</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(5)); CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020). A tribal organization, for this purpose, is defined in the Indian Self-Determination and Education Assistance Act. See 25 U.S.C. § 5304(e), (l). In general, an Indian tribe is any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. In general, a tribal organization is defined as: (1) the recognized governing body of an Indian tribe; and (2) any legally established organization of which is controlled, sanctioned, or chartered by a tribe or which is democratically elected by the adult members of the Indian community to be served by the organization.

<sup>58</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(4)); CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

<sup>59</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(4)); CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

<sup>60</sup> 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?" (September 29, 2020).

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.<sup>61</sup> The vast majority of farm cooperatives are organized under state law.<sup>62</sup>

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.<sup>63</sup> 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 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.<sup>64</sup> 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.<sup>65</sup>

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<sup>61</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(b)(4)); CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 5, para. 2.C (May 20, 2020).

<sup>62</sup> See, for example, Roger A. McEowen, *Agricultural Law in a Nutshell* 343-344 (2017).

<sup>63</sup> For a brief legal summary, see McEowen, at 343-346.

<sup>64</sup> 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/>.

<sup>65</sup> 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?” (September 29, 2020).



### (v) Foreign Entity

A foreign entity can be an eligible producer for CFAP.<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup> In general, if there is only one class of stock, or some similar unit of ownership, FSA looks to the percentage of shares that are owned by a foreign person. If there is more than one class of stock or other similar unit, FSA will look to the percentage of the fair market value of the stock that is owned by a foreign person.

In order to be eligible for CFAP as a foreign entity, each foreign person who is a stockholder, partner, or some other type of member of the entity must provide active personal labor for the farm.<sup>69</sup> To provide active personal labor means to provide physical activities needed for a farming

<sup>66</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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).

<sup>67</sup> FSA Payment Eligibility Handbook, 5-PL, page 3-5, para. 155.A, Exhibit 2, page 5 “Foreign Entity” (October 2, 2019); Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,040 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.401(b)(1)).

<sup>68</sup> 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); Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,040 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.401(b)(1)-(5)). The calculation is based on the higher of either the percent of beneficial interest at the time the CFAP agreement is signed or executed, or the beginning harvest date for the commodity. Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,040 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.401(b)(1)-(5)). 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.

<sup>69</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (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); Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,040 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.401(b)(2)).

operation.<sup>70</sup> Active engagement rules are used for other purposes by FSA and are in flux.<sup>71</sup>

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.<sup>72</sup> 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.<sup>73</sup> These 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.<sup>74</sup> In other places, FSA suggests that an ownership interest means sharing in the risk of production for a commodity.<sup>75</sup> Yet, there are also times where the rules

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<sup>70</sup> Payment Limitation and Payment Eligibility Rule, 85 Fed. Reg. 52,033, 52,037 (August 24, 2020) (to be codified at 7 C.F.R. § 1400.3(b), "Active personal labor"); 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.

<sup>71</sup> For a broader discussion of payment limitations, see Congressional Research Service, U.S. Farm Programs: Eligibility and Payment Limits, Report no. 46248 (March 3, 2020); Congressional Research Service, U.S. Farm Eligibility and Payment Limits Under the 2018 Farm Bill (P.L. 115-334), Report no. 45659 (June 14, 2019); Congressional Research Service, USDA's Actively Engaged in Farming (AEF) Requirement, Report no. 44656 (March 7, 2019); Government Accountability Office, Farm Programs: Information on Payments, GAO-18-384R (May 18, 2016).

<sup>72</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments).

<sup>73</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Producer"); CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 2-1, para. 15.A, page 2-2, para. 15.B, page 2-12, para. 21.A, Exhibit 2, page 2, "Producer" (September 15, 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?" (September 29, 2020).

<sup>74</sup> See, for example, CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (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."

<sup>75</sup> A previous discussion on the FAQ page, USDA, Coronavirus Foods Assistance Program FAQ, "Are aquaculture producers who harvest finfish on their farms eligible for coverage under CFAP?" (June 9, 2020), stated that only finfish producers who have "ownership risk in the production of the finfish

suggest that having an ownership interest in the eligible crops or livestock is a separate requirement altogether.<sup>76</sup> 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.<sup>77</sup>

***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.<sup>78</sup> If it turns out the farmer would have had a share of the crop or livestock, but the crop or livestock was not actually produced and marketed, that still counts as being entitled to a share.

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

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

For a dairy farmer or an egg 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.<sup>79</sup> It seems that the farmer needs to have maintained that interest for the entire three months.

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grown for a commercial market" are eligible for CFAP. This question no longer is included in the FAQ section. USDA, Coronavirus Foods Assistance Program FAQ (September 29, 2020).

<sup>76</sup> See, for example, CFAP Handbook, page 2-2, para. 15.B (September 15, 2020), which states that any person or entity without a reported ownership interest in a commodity is not eligible for CFAP.

<sup>77</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Producer"); CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 2-1, para. 15.A, Exhibit 2, page 2, "Producer" (September 15, 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?" (September 29, 2020).

<sup>78</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Producer"); CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 2-1, para. 15.A, page 6-2, para. 165.C, "Producer" (September 15, 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?" (September 29, 2020).

<sup>79</sup> CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020). The Federal Register does not include a different rule for dairy.

## **(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.<sup>80</sup> Meeting either one makes the farmer an eligible producer.

### **(a) January 15, 2020**

For all commodities except for dairy and eggs, if the farmer had a share in an eligible commodity on January 15, 2020, that farmer can qualify as an eligible producer.<sup>81</sup>

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

For all commodities except for dairy and eggs, 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.<sup>82</sup>

## **c. Ownership Interest**

In order to be an eligible producer, the farmer must have an ownership interest in the crops or livestock.<sup>83</sup> 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

<sup>80</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.3(c)); CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020).

<sup>81</sup> CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 4, para 2.C (May 20, 2020); CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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.

<sup>82</sup> CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 4, para 2.C (May 20, 2020); CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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.

<sup>83</sup> CFAP Handbook, page 2-2, para. 15.B, pages 2-12 through 2-13, para. 21.A-B, page 2-14, para. 22.A, page 3-8, para. 51.E (September 15, 2020); FSA Notice CFAP-4, page 3, para. 2.A, page 5, para. 2.D, pages 9-10, para. 4.B (May 20, 2020).

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 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.”<sup>84</sup>

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

<sup>84</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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” (September 15, 2020).

livestock.”<sup>85</sup> 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.<sup>86</sup> 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 poultry are not listed as an eligible form of livestock under CFAP.<sup>87</sup> Livestock eligibility is discussed in detail below.

### **(v) Marketing Contracts**

As FSA notes, there are many different types of marketing contracts.<sup>88</sup> For the purposes of CFAP, the central question is whether the commodity is subject to price risk. By price risk with a marketing contract, FSA seems to mean that the commodity was unpriced as of January 15, 2020.<sup>89</sup> So, for example, FSA says that any marketing contract that has the potential for a future loss or a basis loss is considered to have a price risk.<sup>90</sup> That means that the commodity is subject to a price risk and can be viewed as unpriced. The FSA Handbook sets out a somewhat confusing list of the types of marketing contracts that are either eligible or not eligible for CFAP.<sup>91</sup>

The following sections describe marketing contract eligibility. The determination of eligibility is based on the form of contract that was in place before January 15, 2020.

<sup>85</sup> USDA, Coronavirus Foods Assistance Program FAQ, “Are contract growers eligible to participate in the Coronavirus Food Assistance Program?” (September 29, 2020).

<sup>86</sup> 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](https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=8717.9).

<sup>87</sup> See Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>. In addition, the USDA website lists layers as being ineligible for CFAP. See USDA, Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1> (September 17, 2020).

<sup>88</sup> For example, see CFAP Handbook, page 5-31, para. 141.B (September 15, 2020).

<sup>89</sup> So, for example, non-specialty crops and wool must be unpriced as of January 15, 2020. CFAP Handbook, page 5-31, para. 141.A (September 15, 2020). Previously, FSA said these crops needed to be “subject to price risk.” See CFAP Handbook, page 5-31, para. 141.A (May 29, 2020).

<sup>90</sup> CFAP Handbook, page 5-31, para. 141.A (September 15, 2020).

<sup>91</sup> CFAP Handbook, page 5-31, para. 141.B (September 15, 2020).

**(a) Basis Contract or Basis Fixed Contract—Eligible**

In a basis contract, or a basis fixed contract, the farmer locks in a basis but leaves the future price to be set later.<sup>92</sup> These contracts are eligible under CFAP.

**(b) No Price Established, Delayed Price, or Deferred Price Contracts—Eligible**

In a situation where there is a contract before January 15, 2020, but the farmer delivers the commodity without setting a sales price, the contract is eligible.<sup>93</sup> So, where the contract is in place before January 15, 2020, but there is no price established, there is a delayed price, or there is a deferred price, the contract is eligible. FSA notes that for these contracts the farmer does not need to have owned the commodity as of January 15, 2020.<sup>94</sup>

**(c) Cash Contracts and Fixed Price Contracts—Not Eligible**

In a situation where there is a contract before January 15, 2020, and the contract provides that the farmer receives a certain cash price for a commodity when it is sold, the contract is not eligible.<sup>95</sup> This means that cash contracts and fixed price contracts are not eligible.

**(d) Forward Price and Forward Contracts—Not Eligible**

If the contract that is in place before January 15, 2020, provides that the farmer receives a cash price based on a future delivery, it is not eligible.<sup>96</sup> This means forward price contracts and forward contracts are not eligible.

**(e) Minimum Price Contracts, Option Contracts, Window Contracts—Not Eligible**

If the contract that is in place before January 15, 2020, provides that the farmer locks in a cash price and buys what is known as a “call option” to establish a minimum price, the contract is not eligible.<sup>97</sup> The net cash price in these contracts is never less than the original cash value minus the cost of the call option. This means that what are often called minimum price contracts, option contracts, and window contracts are not eligible.

<sup>92</sup> CFAP Handbook, page 5-31, para. 141.B (September 15, 2020).

<sup>93</sup> CFAP Handbook, page 5-31, para. 141.B (September 15, 2020).

<sup>94</sup> FSA first noted this in the June 24, 2020, version of the Handbook.

<sup>95</sup> CFAP Handbook, page 5-31, para. 141.B (September 15, 2020).

<sup>96</sup> CFAP Handbook, page 5-31, para. 141.B (September 15, 2020).

<sup>97</sup> CFAP Handbook, page 5-31, para. 141.B (September 15, 2020).

**(f) Hedge to Arrive, Futures Fixed Contract, Futures Contract—Not Eligible**

If the contract that is in place before January 15, 2020, provides that the farmer locks in a futures price and leaves the basis of the contract to be set later, the contract is not eligible.<sup>98</sup> This means that hedge to arrive contracts, futures fixed contracts, and futures contracts are not eligible.

**(g) Pool Marketing Cotton—Possibly Eligible**

Some upland cotton farmers market through a marketing pool. If the farmer retains a price risk, and does not have a fixed and final price, the cotton continues to be eligible.<sup>99</sup>

**(h) Board of Trade Positions—Not Viewed as Priced**

If a farmer takes a position on the Board of Trade—but does not sell an actual commodity—that action does not cause the commodity to be viewed as priced.<sup>100</sup>

### **3. Additional Eligibility Requirements**

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

**a. Conservation Compliance**

A farmer applying for CFAP must meet what are known as conservation compliance requirements.<sup>101</sup> 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.<sup>102</sup> The farmer will need to certify conservation compliance when applying for CFAP.<sup>103</sup> This

<sup>98</sup> CFAP Handbook, page 5-31, para. 141.B (September 15, 2020).

<sup>99</sup> CFAP Handbook, page 5-32, para. 141.C (September 15, 2020).

<sup>100</sup> CFAP Handbook, page 5-31, para. 141.B (September 15, 2020).

<sup>101</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); CFAP Handbook, page 2-2, para. 15.B, and pages 2-8 and 2-9, para. 18.A (September 15, 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?” (September 29, 2020); USDA, Coronavirus Food Assistance Program, CFAP Eligibility (September 17, 2020). Additional rules for conservation compliance that eligible producers must follow can be found at 7 C.F.R. part 12 (2020).

<sup>102</sup> 7 C.F.R. § 12.1(a) (2020).

<sup>103</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (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 (September 15, 2020); FSA Notice CFAP-4, page 7, para. 3.E (May 20, 2020).



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.<sup>104</sup> These AGI limits apply to CFAP.<sup>105</sup>

USDA provides an explanation of how the AGI rule applies to CFAP.<sup>106</sup> 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.<sup>107</sup> For joint ventures and partnerships, the average AGI limitation is applied to each member of the business.

The AGI limitation does not apply if at least 75 percent of the eligible producer's average AGI is from farming, ranching, or forestry-related activities.<sup>108</sup>

### ***c. Compliance with Controlled Substance Rules***

To be eligible for a CFAP payment, a farmer must comply with certain controlled substance rules.<sup>109</sup> This means that a person that is convicted of a controlled substance violation will be ineligible, at least for a time, for CFAP.<sup>110</sup> In particular, the conviction cannot be for planting, cultivating, growing, producing, harvesting, or storing a controlled substance.<sup>111</sup> As of 2018, with the passing of the Agriculture Improvement Act of 2018 (commonly known as the 2018 Farm Bill),

<sup>104</sup> 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](https://www.fsa.usda.gov/Internet/FSA_Notice/pl_289.pdf).

<sup>105</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (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 (September 15, 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).

<sup>106</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory remarks); see also CFAP Handbook, page 2-7, para. 17.A (September 15, 2020).

<sup>107</sup> 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. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(d)); CFAP Handbook, page 2-7, para. 17.A (September 15, 2020); Notice CFAP-4, page 6, para. 3.D (May 20, 2020).

<sup>108</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(d)); CFAP Handbook, page 2-7, para. 17.A (September 15, 2020); Notice PL-289, page 1, para. 1.A (June 1, 2020); Notice CFAP-4, page 6, para. 3.D (May 20, 2020).

<sup>109</sup> CFAP Handbook, page 2-9, para. 18.B (September 15, 2020); FSA Notice CFAP-4, page 7, para. 3.E (May 20, 2020).

<sup>110</sup> USDA, Coronavirus Food Assistance Program, CFAP Eligibility (September 17, 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 (September 15, 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).

<sup>111</sup> 7 C.F.R. § 718.6(b) (2020).

some hemp production will not trigger this restriction because hemp is no longer classified as a Schedule I controlled substance.<sup>112</sup>

## **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.<sup>113</sup> 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.<sup>114</sup> From USDA's perspective, these may mean the same thing as having an ownership interest.

### **2. Suspended, Debarred, or Excluded from Federal Programs**

A farmer that has been suspended, debarred, or otherwise excluded from participating in federal programs is not eligible for CFAP.<sup>115</sup> Suspended and debarred people are banned from a broad range of government programs.<sup>116</sup> 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.<sup>117</sup> Relatively few people will be affected by this restriction. It is not, for example, triggered by delinquency on FSA loans or FSA loan forgiveness.

### **3. Public Schools**

Public schools are not eligible to receive payments under CFAP.<sup>118</sup> Public schools are defined under FSA rules.<sup>119</sup> A public school can be a primary, elementary, or secondary

<sup>112</sup> 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>.

<sup>113</sup> CFAP Handbook, page 2-2, para. 15.B (September 15, 2020); FSA Notice CFAP-4, pages 3, 5, 9 paras. 2.A, 2.D, 4.A (May 20, 2020).

<sup>114</sup> CFAP Handbook, page 2-1, para. 15.A (September 15, 2020); FSA Notice CFAP-4, page 4, para. 2.C (May 20, 2020); CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments).

<sup>115</sup> CFAP Handbook, page 2-2, para. 15.B (September 15, 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).

<sup>116</sup> A suspension is short term, debarment can last longer. For definitions, see 2 C.F.R. §§ 180.925, 180.1015 (2020). For rules on the length of debarment, see 2 C.F.R. § 417.865 (2020).

<sup>117</sup> 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).

<sup>118</sup> CFAP Handbook, page 2-2, para. 15.B (September 15, 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).

<sup>119</sup> FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 7, "Public School" (October 2, 2019).

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.<sup>120</sup> Predominant amount is not defined in FSA rules. A predominant amount probably means the majority.<sup>121</sup> 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.<sup>122</sup>

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. Crops and livestock can be eligible commodities for purposes of CFAP, along with certain aquaculture, nursery, dairy, and egg commodities.<sup>123</sup>

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.<sup>124</sup>

<sup>120</sup> 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).

<sup>121</sup> Predominant can mean something greater or superior in power and influence when compared with something else. Blacks' Law Dictionary (4<sup>th</sup> ed. 1951). Predominance can also mean numerical superiority. See Webster's Third New International Dictionary Unabridged (1986).

<sup>122</sup> CFAP Handbook, page 2-2, para. 15.B (September 15, 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).

<sup>123</sup> CFAP Handbook, page 2-12, para. 21.A (September 15, 2020). Crops are defined by USDA to include both specialty crops and non-specialty crops. CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Crops”).

<sup>124</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Commodity”); CFAP Handbook, page 3-2, para. 50.B (September 15, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020).

## **1. Produced in the United States**

An eligible commodity is an agricultural commodity that is produced in the United States.<sup>125</sup> Imported commodities, which are not used in calculating a CFAP payment, are not eligible.<sup>126</sup>

## **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.<sup>127</sup> 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 May 29, 2020, amendment to the CFAP Handbook, USDA added significant exceptions to this rule.<sup>128</sup> USDA now says that commodities intended to be used on the farm are eligible for CFAP. 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. 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.<sup>129</sup> The CFAP rules for price risk have been revised many times and often in confusing ways, alternating between the phrase “unpriced,” “subject to price risk,” and “have price risk.”<sup>130</sup> The most current CFAP rules for price risk, as of September 2020, are described below.

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<sup>125</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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” (September 15, 2020).

<sup>126</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,830 (May 21, 2020) (to be codified at 7 C.F.R. § 9.1(a)).

<sup>127</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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” (September 15, 2020). Intended use means the end use for which the crop or commodity was grown and produced. CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2); 7 C.F.R. § 718.2, “Intended use” (2020).

<sup>128</sup> CFAP Handbook, page 5-22, para. 137.A (May 29, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a02.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a02.pdf). For the most recent Handbook version, see CFAP Handbook, page 5-22, para. 137.A (September 15, 2020).

<sup>129</sup> See, for example, CFAP Handbook, page 2-16, para. 22.A (May 22, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a01.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a01.pdf).

<sup>130</sup> Compare, for example, CFAP Handbook, pages 2-15 and 2-16, para. 22.A, page 5-31, para. 141.A (June 24, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a03.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a03.pdf), with CFAP Handbook, pages 2-15 and 2-16, para. 22.A, page 5-31, para. 141.A (May 29, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a02.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a02.pdf).

### **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.<sup>131</sup> When filling out a CFAP application, farmers certify that any production, sales and inventory eligible for payment “must be subject to price risk.”<sup>132</sup> 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.<sup>133</sup>

### **b. New Exceptions to Price Risk and Current Rules**

USDA's first CFAP Handbook, issued on May 22, 2020, did not allow for any exceptions to the general rule that all eligible commodities must be subject to price risk.<sup>134</sup> By May 29, 2020, USDA had issued revisions to the Handbook to allow exceptions.<sup>135</sup> In addition, on June 12, 2020, a new CFAP rule was published in the Federal Register that changed some of the price risk requirements for certain commodities.<sup>136</sup> These exceptions, as well as the current price risk rules, are described below.

#### **(i) Specialty Crops**

The May 29, 2020, CFAP Handbook first suggested that there was one category of specialty crops that could be eligible for CFAP even if they

<sup>131</sup> For the general rule, see CFAP Handbook, page 3-2, para. 50.B (September 15, 2020). For the need for non-specialty crops and wool inventory to have a price risk, see CFAP Handbook, pages 5-1 and 5-2, para. 125.B-C, page 5-31, para. 141.A, and page 5-51, para. 151.B (September 15, 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 (September 15, 2020). Handbook definitions are at CFAP Handbook, Exhibit 2, page 2, “Subject to Price Risk,” “Unpriced,” (September 15, 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?” (September 29, 2020).

<sup>132</sup> CFAP Application, page 1, part A.3.

<sup>133</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, “Unpriced”); CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Unpriced inventory”); CFAP Handbook, page 6-2, para. 165.C, “Unpriced,” Exhibit 2, page 2, “Subject to Price Risk,” “Unpriced” (September 15, 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?” (September 29, 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 (September 15, 2020).

<sup>134</sup> See generally CFAP Handbook (May 22, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a01.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a01.pdf).

<sup>135</sup> See generally CFAP Handbook (May 29, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a02.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a02.pdf).

<sup>136</sup> See generally First CFAP Rule Correction, 85 Fed. Reg. 35,799 (June 12, 2020).

were not subject to price risk.<sup>137</sup> 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 a CFAP Rule Correction, published on June 12, 2020, expanded the exceptions to the price risk requirements for specialty crops.<sup>138</sup> 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. 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.<sup>139</sup>

A CFAP Handbook revision, with a date on the document of June 24, 2020, again changed how FSA describes the price risk rules as they relate to specialty crops.<sup>140</sup> Under the June 24, 2020, revision—which has remain unchanged through the current version of the Handbook—specialty crops that were sold between January 15, 2020 and April 15, 2020, are not eligible for CFAP if they were under an agreed upon price as of January 14, 2020, and were or will be paid at that price.<sup>141</sup>

In sum, based on the many 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. Specialty crops that were sold between January 15, 2020, and April 15, 2020 are only eligible for CFAP if they were not subject to an agreed upon price as of April 14, 2020.

## **(ii) Livestock**

Livestock rules have been confusing and have changed over time.

In general, CFAP rules have said that 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

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<sup>137</sup> 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). The June 24, 2020 version of the Handbook eliminates this language.

<sup>138</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)).

<sup>139</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)).

<sup>140</sup> See CFAP Handbook, page 2-16, para. 22.A (June 24, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a03.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a03.pdf).

<sup>141</sup> CFAP Handbook, page 2-16, para. 22.A (June 24, 2020); CFAP Handbook, page 2-16, par. 22.A (September 15, 2020). The same section in the May 29, 2020, Handbook required that, to be eligible, specialty crops which were sold between January 15, 2020 and April 15, 2020 must *not* have been subject to price risk on January 14, 2020. See CFAP Handbook, page 2-16, par. 22.A (May 29, 2020).



May 14, 2020.<sup>142</sup> The CFAP Handbook versions of May 22, 2020, and May 29, 2020, both made clear that all payments for livestock—whether based on sales or inventory—must be subject to price risk as of January 15, 2020.<sup>143</sup> These Handbooks state that being “subject to price risk” and being “unpriced” both mean being not subject to an agreed upon price in the future through a forward contract, agreement, or similar binding document as of January 15, 2020.<sup>144</sup>

A CFAP rule published in the Federal Register on June 12, 2020 seemed to change the requirements for price risk as they relate to livestock.<sup>145</sup> Under the new June 12, 2020 rule, eligible livestock sales need to have been of unpriced livestock, but payments for livestock in inventory no longer specified that the inventory must be unpriced, just that the livestock inventory must have been owned.<sup>146</sup> These changes are also reflected in the most recent version of the Handbook.<sup>147</sup>

<sup>142</sup> See CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020); CFAP Handbook, page 6-24, para. 178.A, page 6-45, para. 188.B (September 15, 2020). The September 15, 2020 Handbook, at para. 188.B says livestock must have remained in inventory between January 16, 2020 and May 4, 2020. This appears to be an error as the rules and other Handbook paragraphs include the correct date of May 14, 2020.

<sup>143</sup> CFAP Handbook, page 6-22, para. 177.A, page 6-2, para. 165.C, “Unpriced” (May 22, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a01.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a01.pdf). CFAP Handbook, page 6-22, para. 177.A, page 6-2, para. 165.C, “Unpriced” (May 29, 2020) at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a02.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a02.pdf). In both of these Handbooks versions, USDA noted 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.

<sup>144</sup> CFAP Handbook, page 6-22, para. 177.A, page 6-2, para. 165.C, “Unpriced” (May 22, 2020); CFAP Handbook, page 6-22, para. 177.A, page 6-2, para. 165.C, “Unpriced” (May 29, 2020). In both of these Handbooks versions, USDA noted 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.

<sup>145</sup> CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5). A USDA FAQ released prior to the publication of the June 12, 2020 rule did not reflect these 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).

<sup>146</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c)(1), (d)(1), (f)(1)). The May 21, 2020 rule refers to “unpriced cattle inventory,” “unpriced hog and pig inventory” and “unpriced lambs and yearlings in inventory” as eligible, whereas the June 12, 2020 rule refers to “cattle inventory owned,” “hog and pig inventory owned” and “lambs and yearlings in inventory owned. Compare CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(c)(2), (d)(2), (f)(2)) with First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c)(2), (d)(2), (f)(2)). In addition, USDA removed the definition of “unpriced inventory” in the June 12, 2020 rule and replaced it with simply “unpriced.” First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020). Finally, the prefatory remarks for the June 12, 2020 rule 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.

<sup>147</sup> CFAP Handbook, page 6-22, para. 177.A (September 15, 2020).

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.<sup>148</sup> There is one, limited exception to this rule that USDA notes should only apply under “very specific and special circumstances” arising out of the closure and disruptions to processing plants because of COVID-19.<sup>149</sup> Specifically, this exception allows certain livestock which were priced or intended to be priced and sold during the period from January 15, 2020, through April 15, 2020, to be eligible for CFAP, so long as there were conditions out of the producer’s control—due to COVID-19—that prevented the actual pricing or sales transaction. This exception only applies to commercially produced and marketed livestock that were owned on January 15, 2020, and which were slaughtered between January 15, 2020, and April 15, 2020. The exception does not apply to livestock slaughtered for personal use and consumption.

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.<sup>150</sup>

### **(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.<sup>151</sup> It would not be surprising, in other words, for USDA to make 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

<sup>148</sup> CFAP Handbook, page 6-22, para. 177.A (September 15, 2020).

<sup>149</sup> CFAP Handbook, page 6-24, para. 178.A (September 15, 2020).

<sup>150</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c)(1), (d)(1), (f)(1)); CFAP Handbook, page 6-22, para. 177.A (September 15, 2020).

<sup>151</sup> 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). With the Handbook amendment on May 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 September 15, 2020 Handbook expressly states that dairy must be unpriced or subject to price risk. Neither do any of the CFAP rules in the Federal Register expressly require that dairy be unpriced or subject to price risk. See generally CFAP Rule, 85 Fed. Reg. 30,825 (May 21, 2020); First CFAP Rule Correction, 85 Fed. Reg. 35,799 (June 12, 2020).



one another. It may be that USDA has decided that for several commodities the unpriced rules simply do not apply.

#### **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.<sup>152</sup> USDA has created lists of commodities that are currently eligible.<sup>153</sup> 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.

#### **5. Unprocessed Commodities**

In general, USDA has not allowed processed commodities to be eligible.<sup>154</sup> Commodities that are not eligible because they are processed include maple butter, maple sugar, olive oil, wine, raisins, and cheese.

### **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.<sup>155</sup> This means that for all bison producers in the country, bison is not an eligible commodity, and no one can receive a CFAP payment for 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 September 17, 2020**

The following sections describe the CFAP-eligible commodities as of September 17, 2020. This list has changed repeatedly and significantly since the first CFAP rule was released.<sup>156</sup>

Each of the eligible commodities falls into one of the following categories: (1) dairy; (2) eggs; (3) wool; (4) livestock, including cattle, swine and sheep; and (5) crops, including non-specialty crops and specialty crops; (6) aquaculture; and (7) floriculture/nursery.<sup>157</sup> The specific eligibility rules for each commodity is discussed briefly below. These

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<sup>152</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Commodity”); CFAP Handbook, Exhibit 2, page 1, “Commodity” (September 15, 2020).

<sup>153</sup> See, for example, CFAP Handbook, pages 2-12 and 2-12.5, para. 21.A (September 15, 2020).

<sup>154</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020).

<sup>155</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,590-49,591 (August 14, 2020).

<sup>156</sup> Compare CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) with NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,322 (July 10, 2020) and NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020).

<sup>157</sup> CFAP Handbook, pages 2-12 and 2-12.5, para. 21.A (September 15, 2020).

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

According to USDA, if a farmer submitted a CFAP application that was denied because of an ineligible commodity that has since been made eligible, the farmer must submit a new CFAP application.<sup>158</sup> However, if a farmer previously submitted a CFAP application and received a payment based on that application, but the payment rates have since increased or additional commodities were since made eligible that are applicable to the farmer, the farmer should contact their local FSA office to amend that application.

## 1. Dairy

Dairy is an eligible commodity.<sup>159</sup> 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. Changes in the CFAP rules make clear that only bovine milk is an eligible dairy commodity.<sup>160</sup> Goat milk, for example, is not eligible.<sup>161</sup>

Eligible milk production can include milk that was commercially marketed for the months of January, February, and March 2020.<sup>162</sup> Milk that was dumped during the months of January, February or March 2020 is also eligible for CFAP.

To be eligible, the milk must be commercially marketed in the United States.<sup>163</sup>

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.<sup>164</sup>

Dissolved dairy operations have special rules.<sup>165</sup> If they dissolved in the first two quarters of 2020 (January through June), they are eligible for CFAP for the pounds of milk produced.<sup>166</sup> Dairy farming operations that dissolved in the first quarter of 2020

<sup>158</sup> USDA, Coronavirus Food Assistance Program, Commodities Added to the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1>.

<sup>159</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 4-1, para. 85.A, page 4-31, para. 96.A (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (August 14, 2020); USDA, Coronavirus Food Assistance Program FAQ, "What commodities and livestock are eligible?" (September 29, 2020); USDA, Dairy and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/dairy>; FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (August 10, 2020), at: <https://www.farmers.gov/sites/default/files/documents/FSA-CFAP-Dairy-Fact-Sheet-English-08112020.pdf>.

<sup>160</sup> This change was first noted in the August 6, 2020 amendment to the CFAP Handbook. See CFAP Handbook, page 4-31, para. 96.A (August 6, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/1-cfap\\_roo\\_a04.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-cfap_roo_a04.pdf); see also CFAP Handbook, page 4-31, para. 96.A (September 15, 2020).

<sup>161</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020).

<sup>162</sup> CFAP Handbook, page 4-31, para. 96.B (September 15, 2020); USDA, Coronavirus Food Assistance Program FAQ, "What milk is eligible for CFAP?" (September 29, 2020).

<sup>163</sup> CFAP Handbook, page 4-31, para. 96.A (September 15, 2020).

<sup>164</sup> CFAP Handbook, page 4-31, para. 96.B (September 15, 2020).

<sup>165</sup> CFAP Handbook, page 4-31, para. 96.C, page 4-33, para. 97.C (September 15, 2020). This provision first appeared in the August 6, 2020 version of the CFAP Handbook.

<sup>166</sup> CFAP Handbook, page 4-31, para. 96.C (September 15, 2020).

(January through March) are eligible only for CARES Act funding. If the dairy dissolved in the second quarter of 2020 (April, May, or June), it is eligible for full CARES Act funding and part of a CCC payment. The CCC payment is prorated according to the number of days the farm was in operation in that period. A dissolved dairy operation should use the revised version of the AD-2114 application form that was released on August 14, 2020.

Joint venture dairy operations sometimes also have special rules.<sup>167</sup> If a joint venture dairy operation markets milk in the United States 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. The CFAP Handbook states that FSA county offices will provide guidance and direction for joint venture dairy operations.

## 2. Eggs

Eggs were added as an eligible commodity in a change to CFAP rules made in August 2020.<sup>168</sup> Only chicken eggs that are commercially marketed are eligible.

Eligible egg production for CFAP is limited to frozen eggs produced for the first quarter of 2020, and liquid eggs produced for the same months.<sup>169</sup> Other types of eggs, including shell and dried eggs, are not eligible.<sup>170</sup> Eggs that are sold and will be broken, but are still in the shell—including nest eggs—can be eligible.<sup>171</sup>

Egg operations that have a risk in the egg sales, whether an owner of layers or a processor, are eligible for CFAP.<sup>172</sup> However, egg operations that have a guaranteed price on their eggs are not eligible. This means that if eggs are sold or processed as liquid or frozen eggs, and they do not have a guaranteed payment for the producer, they will be eligible for CFAP.<sup>173</sup>

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<sup>167</sup> CFAP Handbook, page 4-32, para. 96.D (September 15, 2020).

<sup>168</sup> See NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020). See also CFAP Handbook, page 4-31, para. 96.A (September 15, 2020); USDA, Eggs and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/eggs>.

<sup>169</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 4-31, para. 96.A (September 15, 2020).

<sup>170</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591-49,592 (prefatory remarks) (August 14, 2020).

<sup>171</sup> CFAP Handbook, page 4-31, para. 96.B (September 15, 2020).

<sup>172</sup> CFAP Handbook, page 4-31, para. 96.A (September 15, 2020). The Handbook states that FSA county offices must determine who has risk.

<sup>173</sup> CFAP Handbook, page 4-31, para. 96.B (September 15, 2020).

### 3. Wool

Wool can be an eligible commodity under CFAP.<sup>174</sup> Wool is defined as the fiber sheared from live sheep.<sup>175</sup> It includes both graded and ungraded wool.<sup>176</sup> Graded wool is to be paid on a clean basis, and ungraded wool is paid on a greasy basis.

### 4. Livestock

Livestock can be an eligible commodity under CFAP.<sup>177</sup> USDA determined the eligibility of specific livestock based on whether the livestock experienced a 5-percent-or-greater market price decline from the average for the week of January 13-17, 2020, to the average for the week of April 6-10, 2020.<sup>178</sup> 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.<sup>179</sup> Livestock are eligible for CFAP even if the farmer purchased livestock insurance coverage offering protection against market price declines.<sup>180</sup>

The following sections outline the specific eligibility requirements for each type of livestock. Only those livestock listed below are currently eligible for CFAP.<sup>181</sup>

#### a. Cattle

Cattle can be an eligible commodity under CFAP.<sup>182</sup> By cattle, USDA means commercially raised or maintained bovine animals.<sup>183</sup> For CFAP purposes, the

<sup>174</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825-30,826 (May 21, 2020) (prefatory comments); CFAP Handbook, pages 5-1 and 5-2, para. 125 (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); USDA, Wool and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/wool>; FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (August 10, 2020), at: <https://www.farmers.gov/sites/default/files/documents/FSA-CFAP-Wool-Fact-Sheet-English-08112020.pdf>.

<sup>175</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Wool”); CFAP Handbook, Exhibit 2, page 3, “Wool” (September 15, 2020).

<sup>176</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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 3 (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

<sup>177</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 6-23, para. 177.B (September 15, 2020); USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>; FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (August 12, 2020), at: <https://www.farmers.gov/sites/default/files/documents/FSA-CFAP-Livestock-FactSheet-English-08132020.pdf>.

<sup>178</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); CFAP Handbook, page 6-1, para. 165.B (September 15, 2020).

<sup>179</sup> CFAP Handbook, page 6-23, para. 177.B (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>.

<sup>180</sup> CFAP Handbook, page 6-21, para. 176.B (September 15, 2020).

<sup>181</sup> CFAP Handbook, pages 6-22 and 6-23, para. 177.A-B (September 15, 2020).

<sup>182</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 6-23, para. 177.B (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

<sup>183</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Cattle”); CFAP Handbook, page 6-1, para. 165.C, “Cattle” (September 15, 2020).

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.<sup>184</sup> These categories matter because CFAP payments vary depending on the commodity category the livestock fall within. The following sections describe 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.<sup>185</sup> 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.<sup>186</sup>

#### **(a) Calves**

Calves will usually count as Feeder Cattle Under 600 pounds.<sup>187</sup> It is important to note that calves that are intended to be milk cows do not count as feeder cattle.<sup>188</sup>

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

First, newborn calves count as Feeder Cattle Under 600 Pounds.<sup>189</sup>

Second, calves that are still nursing a cow fit into this category.<sup>190</sup> These calves generally weigh less than 500 pounds, according to USDA.

<sup>184</sup> CFAP Handbook, page 6-23, para. 177.B (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (August 12, 2020); USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>.

<sup>185</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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 (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

<sup>186</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>.

<sup>187</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>188</sup> Cattle, in general, do not include animals intended for dairy production. CFAP Handbook, page 6-1, para. 165.C, “Cattle” (September 15, 2020).

<sup>189</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>190</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

Third, bucket calves fit into this category.<sup>191</sup> USDA thinks of bucket calves as orphaned or newborn calves normally purchased when they are one to ten days old.

Fourth, weaner or weaned calves can fall within the category of Feeder Cattle Under 600 pounds.<sup>192</sup> 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.<sup>193</sup> The heifers must weigh less than 600 pounds.

#### **(c) Heiferettes**

Feeder Cattle Under 600 Pounds can include what USDA calls heiferettes.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup> 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.

<sup>191</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>192</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>193</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>194</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>195</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>196</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).



### **(f) Stockers/Feeders/Feeder Calves**

Feeder Cattle Under 600 Pounds can include stockers, feeders, or feeder calves.<sup>197</sup> 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.<sup>198</sup> To be eligible under this category, the cattle must weigh less than cattle in the category of Slaughter Cattle-Fed Cattle.<sup>199</sup> 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.<sup>200</sup>

#### **(a) Heiferettes**

Feeder Cattle 600 Pounds or More can include what USDA calls heiferettes.<sup>201</sup> 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.<sup>202</sup> 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.

<sup>197</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>198</sup> CFAP Handbook, page 6-2, para. 165.C, “Feeder cattle 600 pounds or more,” page 6-23, para. 177.B (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

<sup>199</sup> This means the cattle must weigh less than 1,200 pounds. See First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, “Slaughter cattle-fed cattle”); see also CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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” (September 15, 2020).

<sup>200</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>.

<sup>201</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>202</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

**(c) Weaner or Weaned Calves**

Weaner calves and weaned calves can count as Feeder Cattle 600 Pounds or More.<sup>203</sup> 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.<sup>204</sup> 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.<sup>205</sup> 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.<sup>206</sup> 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.<sup>207</sup> The heifers must weigh at least 600 pounds.

<sup>203</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>204</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>205</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>206</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>207</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).



### **(iii) Slaughter Cattle—Fed Cattle**

USDA considers Slaughter Cattle—Fed Cattle to be an eligible commodity.<sup>208</sup> For this category, USDA means cattle that weigh 1,200 pounds or more and which are intended for slaughter.<sup>209</sup>

According to USDA, livestock that fall within the category of Slaughter Cattle—Fed Cattle, include the following.<sup>210</sup>

#### **(a) Finished Cattle—1200 Pounds or More**

The category of Slaughter Cattle—Fed Cattle includes finished cattle that weigh 1200 pounds or more.<sup>211</sup> 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.<sup>212</sup> 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.<sup>213</sup>

<sup>208</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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 (September 15, 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).

<sup>209</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 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" (September 15, 2020). Previously, the rule defined Slaughter Cattle-Fed Cattle as being cattle intended for slaughter that had an average weight greater than 1400 pounds, with an average carcass weight greater than 800 pounds. See CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Slaughter cattle-fed cattle").

<sup>210</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>.

<sup>211</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>212</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>213</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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, Exhibit 2, page 3, "Slaughter Cattle- Mature Cattle" (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 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.<sup>214</sup>

According to USDA, livestock that fall within the category of Slaughter Cattle—Mature Cattle can include the following.<sup>215</sup>

**(a) Open Cows—Slaughter**

The category of Slaughter Cattle-Mature Cattle includes open cows.<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup> 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.<sup>219</sup> USDA defines this category to mean commercially raised or maintained bovine animals that do not fall within the other cattle commodity categories listed above.<sup>220</sup>

<sup>214</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>215</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>.

<sup>216</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>217</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>218</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>219</sup> CFAP Handbook, page 6-23, para. 177.B, page 6-1, para. 165.C, “All other cattle,” Exhibit 2, page 1, “All Other Cattle” (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

<sup>220</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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” (September 15, 2020).

Beefalo, bison, and cattle used or intended for dairy are not included in this category and are not eligible as cattle for purposes of CFAP.<sup>221</sup>

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.<sup>222</sup> 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.<sup>223</sup>

According to USDA, livestock that fall within the category of All Other Cattle include the following.<sup>224</sup>

**(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.<sup>225</sup> 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.<sup>226</sup> 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.<sup>227</sup> 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

<sup>221</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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, "All other cattle," Cattle" (September 15, 2020).

<sup>222</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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 (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (August 12, 2020). Intended use means the end use for which the crop or commodity was grown and produced. CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2); 7 C.F. R. 718.2, "Intended use" (2020).

<sup>223</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>224</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>.

<sup>225</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>226</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>227</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

calf.<sup>228</sup> USDA may have meant to include in the definition that the animal is pregnant. This category seems not to include dairy animals.

**(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.<sup>229</sup> 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.<sup>230</sup> By USDA's definition, herd bulls are approximately twenty-four months of age or older. Herd bulls only include beef bulls.<sup>231</sup>

**b. Swine—Hogs and Pigs**

Swine—specifically hogs and pigs—can be eligible commodities for CFAP.<sup>232</sup> For this purpose, hogs are defined as weighing 120 pounds or more.<sup>233</sup> Pigs are defined as weighing less than 120 pounds.<sup>234</sup>

**c. Sheep—All Sheep Now Eligible**

Sheep can be an eligible commodity for CFAP.<sup>235</sup> Until recently, however, only lambs and yearlings were eligible for CFAP.<sup>236</sup> That changed with the publication of new CFAP rules dated August 14, 2020.<sup>237</sup> Now, payments are possible for all

<sup>228</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>229</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020).

<sup>230</sup> USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 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. 30,825, 30,831 (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" (September 15, 2020).

<sup>231</sup> 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 (September 15, 2020); USDA, Livestock and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/livestock>.

<sup>232</sup> CFAP Handbook, page 6-23, para. 177.B (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020).

<sup>233</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Hogs"); CFAP Handbook, page 6-23, para. 177.B (September 15, 2020).

<sup>234</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Pigs"); CFAP Handbook, page 6-23, para. 177.B (September 15, 2020).

<sup>235</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12, para. 21.A, page 6-23, para. 177.B (September 15, 2020).

<sup>236</sup> For the previous rules, see CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory remarks); CFAP Handbook, page 6-23, para. 177.B (May 22, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "What commodities and livestock are eligible?" (June 9, 2020).

<sup>237</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,590 (August 14, 2020); CFAP Handbook, page 2-12, para. 21.A, page 6-23, para. 177.B (August 14, 2020).

sheep.<sup>238</sup> The payment rate for lambs and yearlings, however, is different than the payment rate for all other sheep.<sup>239</sup> By lambs and yearlings, USDA means all sheep less than two years old.<sup>240</sup> By all other sheep, USDA means sheep two years of age or older.<sup>241</sup>

**d. Poultry—NOT Eligible**

Poultry is not an eligible commodity.<sup>242</sup> Neither are turkeys, ducks, and quail.

**e. Goats—NOT Eligible**

Goats for meat are not eligible for CFAP.<sup>243</sup>

**f. Bison, Buffalo, Beefalo—NOT eligible**

Bison, buffalo, and beefalo are not eligible for CFAP.<sup>244</sup>

**g. Mink—NOT Eligible**

Mink is not eligible for CFAP.<sup>245</sup>

**h. Mohair NOT Eligible**

Mohair is not eligible for CFAP.<sup>246</sup>

**i. Horses NOT Eligible**

Horses are not eligible for CFAP.<sup>247</sup>

## 5. Crops

Eligible crops for CFAP include non-specialty crops and specialty 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.

<sup>238</sup> CFAP Handbook, page 6-45, para. 177.B (September 15, 2020).

<sup>239</sup> CFAP Handbook, page 6-45, para. 188.A (September 15, 2020).

<sup>240</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Lambs and yearlings”); CFAP Handbook, page 6-1, para. 165.C, page 6-23, para. 177.B (September 15, 2020).

<sup>241</sup> CFAP Handbook, page 6-1, para. 165.C, “All other sheep,” Exhibit 1, page 1, “All other sheep” (August 14, 2020).

<sup>242</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020).

<sup>243</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,590 (prefatory remarks) (August 14, 2020).

<sup>244</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,590-49,591 (prefatory remarks) (August 14, 2020).

<sup>245</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020).

<sup>246</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020).

<sup>247</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020).

### **a. Non-Specialty Crops**

Non-specialty crops can be eligible commodities for CFAP.<sup>248</sup> The following rules apply.

#### **(i) How USDA Decided 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.<sup>249</sup> If the decline in the futures prices was 5 percent or greater, then USDA made the non-specialty crop eligible for CFAP.<sup>250</sup>

Presumably, no other non-specialty crops will be added after the deadline of September 11, 2020.<sup>251</sup>

#### **(ii) 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 non-specialty crops by both their type and their intended use.<sup>252</sup> The Handbook is the only place that references specific types and intended uses of eligible non-specialty crops.<sup>253</sup> 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.

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<sup>248</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Non-specialty crops"); CFAP Handbook, page 2-12, para. 21.A (September 15, 2020); FSA Notice CFAP-4, page 9, para. 4.A (May 20, 2020); USDA, Non-Specialty Crops and Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/non-specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (August 10, 2020), at: <https://www.farmers.gov/sites/default/files/documents/FSA-CFAP-Non-SpecialtyCrops-Fact-Sheet-English-08112020.pdf>.

<sup>249</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 5-1, para. 125.B (September 15, 2020).

<sup>250</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 5-1, para. 125.A (September 15, 2020).

<sup>251</sup> USDA has previously issued Notices of Funding Availability (NOFAs) to request information on commodities that could potentially become eligible for CFAP. See, for example, NOFA: CFAP Additional Commodities Request for Information, 85 Fed. Reg. 31,062 (May 22, 2020); NOFA Correction, 85 Fed. Reg. 35,812, 35,812 (June 12, 2020). It is unclear—now that the September 11, 2020 CFAP deadline has passed, and USDA has released the CFAP 2 program—whether additional commodities will be added to the first CFAP program.

<sup>252</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020).

<sup>253</sup> Neither the CFAP Rule, the USDA website, nor the CFAP Application itself limit eligibility of crops based on their type or intended use.



### **(iii) 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.<sup>254</sup> Intended use means the end use for which the crop or commodity was grown and produced.<sup>255</sup>

The CFAP Handbook lists six types of uses that are allowed for CFAP non-specialty crops.<sup>256</sup> 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.<sup>257</sup> 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.<sup>258</sup>

#### **(b) Fresh**

An acceptable intended use for some non-specialty crops is what FSA calls fresh.<sup>259</sup> 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.

#### **(c) Grain**

For some non-specialty crops, grain can be an intended use.<sup>260</sup> This means that the crop is intended to be harvested as small hard seed such as corn, rye, oats, millet, or wheat.

<sup>254</sup> For these restrictions, see CFAP Handbook, page 5-22, para. 137.A (September 15, 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 (September 8, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/2-cp\\_r16\\_a13.pdf](https://www.fsa.usda.gov/Internet/FSA_File/2-cp_r16_a13.pdf).

<sup>255</sup> See 7 C.F.R. § 718.2, "Intended use" (2020).

<sup>256</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>257</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>258</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Non-specialty crops"); CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); USDA, Non-Specialty Crops and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/non-specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crops (August 10, 2020).

<sup>259</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>260</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

**(d) Processed**

For some non-specialty crops, the crop can be intended to be processed.<sup>261</sup> 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.<sup>262</sup> 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 and Hay**

For some non-specialty crops, silage and hay are an acceptable intended use.<sup>263</sup> For silage, the crop must be intended to be preserved through fermentation and then fed to livestock. FSA requires records for silage production. Production needs to be converted to bushels for calculating the payment. Silage and hay conversion rates are described in the FSA Handbook for CFAP. Corn, grain sorghum, millet, oats, soybeans and wheat can be eligible as silage. Corn, grain sorghum, millet, oats, soybeans, and wheat can be eligible as hay. Barley is not, although at one point it was listed as eligible. If a commodity is harvested as grain and the stalks are harvested for hay, that hay is not eligible.

**(iv) Crops Intended for Grazing Not Eligible**

As a general rule, crops intended for grazing are not eligible as non-specialty crops.<sup>264</sup> 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.

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<sup>261</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>262</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>263</sup> CFAP Handbook, page 5-30, para. 140 (September 15, 2020). Barley is not available for silage or hay as of June 24, 2020. CFAP Handbook, page 5-30, para. 140.B, 140.C (June 24, 2020)

<sup>264</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Non-specialty crops"); CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); USDA, Non-Specialty Crops and the Coronavirus Food Assistance Program (September 17, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crops (August 10, 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).



### **(v) Eligible Non-Specialty Crops—as of September 15, 2020**

The following are eligible non-specialty crops for CFAP. 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.<sup>265</sup>

#### **(a) Malting Barley**

According to the CFAP Handbook, all types of barley are eligible for CFAP.<sup>266</sup> The rules for barley, however, make it unclear exactly what counts as eligible barley. For example, the Handbook also says that only barley delivered as malting barley is eligible, and the only allowable intended uses for barley include forage, grain, and seed.<sup>267</sup>

#### **(b) Canola**

All types of canola can be eligible for CFAP.<sup>268</sup> 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.<sup>269</sup> 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.<sup>270</sup> It is not clear from the Handbook if there are any limits on the type or intended uses for the upland cotton.

ELS cotton, sometimes known as Pima cotton, is not eligible.<sup>271</sup>

<sup>265</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>266</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 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 (September 15, 2020).

<sup>267</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020).

<sup>268</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>269</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>270</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>271</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49590 (prefatory remarks) (August 14, 2020).

**(e) Millet**

All types of millet are eligible for CFAP.<sup>272</sup> The intended use must be forage, grain, or seed.

**(f) Oats**

All types of oats are eligible for CFAP.<sup>273</sup> The intended use must be forage, grain, or seed.

**(g) Sorghum**

All types of sorghum are eligible for CFAP.<sup>274</sup> 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.<sup>275</sup> The intended use must be forage, fresh, grain, seed, or processing.

**(i) Sunflowers**

All types of sunflowers are eligible for CFAP.<sup>276</sup> Any intended use is eligible as well.

**(j) Wheat and Durum Wheat**

Hard red spring wheat is eligible for CFAP.<sup>277</sup> 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.

Other wheat varieties, such as hard red winter wheat, soft red winter wheat, and soft white winter wheat, are not eligible.<sup>278</sup>

<sup>272</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>273</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>274</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>275</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>276</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>277</sup> CFAP Handbook, page 5-22, para. 137.A (September 15, 2020); Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (September 8, 2020).

<sup>278</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,590 (prefatory comments) (August 14, 2020).

### **a. Specialty Crops**

USDA has decided that only certain specialty crops are eligible for CFAP.<sup>279</sup> For some of these crops, only specific types of the specialty crops are eligible.<sup>280</sup> In addition, for some crops only certain intended uses of the crops are eligible.<sup>281</sup>

#### **(i) How USDA Decides Eligibility of Specialty Crops**

When the rules for CFAP were first published, it appeared that USDA made many of its specialty crop eligibility decisions by comparing 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.<sup>282</sup> If the reduction was 5 percent or greater, according to USDA, then USDA made the crop eligible for CFAP. With new CFAP rules published on July 10, 2020 and August 14, 2020, USDA responded to comments expressing the belief that certain commodities should be eligible "even when no price decrease was identified because they were affected by market chain disruptions."<sup>283</sup> Accordingly, USDA made dozens of additional specialty crops eligible for CFAP based exclusively on market chain disruptions. The Second Edition of FLAG's Farmers' Guide to the Coronavirus Food Assistance Program outlines in greater detail the process by which it appears USDA has approached making commodity-eligibility determinations.<sup>284</sup>

As it stands currently, USDA says that eligible specialty crops can include crops that—during the period between January 15, 2020 and April 15, 2020—experienced immediate losses, suffered a price decline, were spoiled, were crops for which no payment was received, or were unharvested due to market conditions.<sup>285</sup>

#### **(ii) More Specialty Crops Were Added Before Deadline**

<sup>279</sup> CFAP Handbook, page 8-21, para. 221.B (September 15, 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/cfap1/specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crops (August 18, 2020).

<sup>280</sup> CFAP Handbook, pages 8-21 through 8-22.7, para. 221.B (September 15, 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/cfap1/specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crops (August 18, 2020).

<sup>281</sup> For these restrictions, see CFAP Handbook, pages 8-21 through 8-22.7, para. 221.B (September 15, 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](https://www.fsa.usda.gov/Internet/FSA_File/2-cp_r16_a12.pdf).

<sup>282</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments); NOFA, CFAP Additional Commodities Request for Information, 85 Fed. Reg. 31,062, 31,063 (May 22, 2020).

<sup>283</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,589 (prefatory remarks) (August 14, 2020).

<sup>284</sup> See FLAG, Farmers' Guide to Coronavirus Food Assistance Program (CFAP), Second Edition, pages 48 through 57 (June 17, 2020), at: <http://www.flaginc.org/wp-content/uploads/2020/10/Farmers-Guide-to-the-Coronavirus-Food-Assistance-Program-CFAP-2nd-Edition-June-17-2020-Archived.pdf>.

<sup>285</sup> CFAP Handbook, page 8-1, para. 211.B (September 15, 2020).

Over time, USDA has added many specialty crops to the list of eligible crops and chosen not to add others.<sup>286</sup> The way that happened 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.<sup>287</sup> The Handbook is the only place that references specific types and intended uses of eligible specialty crops.<sup>288</sup> 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 of Specialty Crops**

According to the CFAP Handbook, there are four main intended uses that are allowed for eligible specialty crops—fresh, processed, juice, and seed.<sup>289</sup> Intended use means the end use for which the crop or commodity was grown and produced.<sup>290</sup>

As of the application deadline on September 11, 2020, the following are the only four intended uses of specialty crops that are eligible for CFAP.<sup>291</sup> 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.”<sup>292</sup> 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.<sup>293</sup> This means that it is intended to have an end use after undergoing

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<sup>286</sup> See generally NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589 (August 14, 2020); NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321 (July 10, 2020).

<sup>287</sup> CFAP Handbook, pages 8-21 through 8-22.7, para. 221.A-B (September 15, 2020).

<sup>288</sup> Neither the CFAP Rule, the USDA website, nor the CFAP Application itself limit eligibility of crops based on their type or intended use.

<sup>289</sup> CFAP Handbook, pages 8-21 through 8-22.7, para. 221.B (September 15, 2020); Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020).

<sup>290</sup> See 7 C.F.R. § 718.2, “Intended use” (2020).

<sup>291</sup> CFAP Handbook, pages 8-21 through 8-22.7, para. 221.B (September 15, 2020).

<sup>292</sup> Acreage and Compliance Determinations Handbook, Exhibit 11.E, pages 6-8 (March 16, 2020); CFAP Handbook, pages 8-21 through 8-22.7, para. 221.B (September 15, 2020).

<sup>293</sup> Acreage and Compliance Determinations Handbook, exhibit 11.E, pages 6-8 (March 16, 2020); CFAP Handbook, pages 8-21 through 8-22.7, para. 221.B (September 15, 2020).

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.<sup>294</sup> This means that the intention of growing the crop is to harvest the natural fluid, fluid content, or liquid in the crop.

**(d) Seed**

An acceptable intended use for some specialty crops is seed.<sup>295</sup> This means the intention in growing the crop is to harvest the plant's seed for growing a new crop, and not for human or livestock consumption.

**(v) Eligible Specialty Crops—As of September 17, 2020**

Below are the specialty crops that USDA has decided are eligible for CFAP as of September 17, 2020.<sup>296</sup> 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.

The list of eligible crops has changed over time. FSA added a number of eligible specialty crops in rules dated July 10, 2020 and August 14, 2020.<sup>297</sup> These additions were first included in the CFAP Handbooks dated August 6, 2020, and August 14, 2020.<sup>298</sup> A chart of the eligible specialty crops can be found on USDA's website.<sup>299</sup>

<sup>294</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (March 16, 2020); CFAP Handbook, pages 8-21 through 8-22.7, para. 221.B (September 15, 2020). For at least some purposes, beginning in 2017, USDA decided 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.

<sup>295</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, pages 6-8 (March 16, 2020); CFAP Handbook, pages 8-21 through 8-22.7, para. 221.B (September 15, 2020).

<sup>296</sup> CFAP Handbook, page 2-12, para. 21.A, pages 8-21 through 8-22.7, para. 221.B (September 15, 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?" (September 29, 2020); CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, "Specialty crops").

<sup>297</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,322 (July 10, 2020); NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020).

<sup>298</sup> CFAP Handbook, pages 2-17 through 2-20, para. 22.B (August 6, 2020); CFAP Handbook, pages 2-17 through 2-23, para. 22.B (August 14, 2020). See also CFAP Handbook, pages 8-21 through 8-22.7, para. 221.B (September 15, 2020); USDA, Specialty Crops and the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1/specialty>.

<sup>299</sup> USDA, Specialty Crops and the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1/specialty>.

**(a) Alfalfa Sprouts**

Alfalfa sprouts are eligible as a CFAP specialty crop.<sup>300</sup> They were added as a specialty crop for CFAP by a change to the CFAP rules published on July 10, 2020.<sup>301</sup> It is not clear if all types of alfalfa sprouts are eligible. It is also not clear if there are any restrictions based on the intended use of the alfalfa sprouts.

**(b) Almonds**

Almonds are eligible as a specialty crop for CFAP.<sup>302</sup> 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 almonds.

**(c) Aloe Leaves**

Aloe leaves are an eligible crop.<sup>303</sup> They were added in a change to CFAP rules on August 14, 2020. It is not clear if all types of aloe leaves are eligible. It is also not clear if there are any restrictions based on the intended use of almonds.

**(d) Anise**

Anise is an eligible as a specialty crop for CFAP.<sup>304</sup> Anise was added in a change to CFAP rules on July 10, 2020.<sup>305</sup> Fennel is the type of anise that is eligible. The purpose of the crop must be to produce seeds.

**(e) Apples**

All types of apples are eligible for CFAP as a specialty crop.<sup>306</sup> The intended use for the apples must be fresh, juice, or processed. Payment rates for apples changed on July 10, 2020.<sup>307</sup>

**(f) Artichokes**

Artichokes are eligible as a specialty crop for CFAP.<sup>308</sup> It is not clear if all types of artichokes are eligible. The intended use of the artichokes

<sup>300</sup> FSA Notice CFAP-7, page 2, para. 2.A, page 3, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B, (September 15, 2020).

<sup>301</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>302</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>303</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>304</sup> FSA Notice CFAP-7, "Additional Specialty Crops for Coronavirus Food Assistance Program (CFAP)," page 2, para. 2.A, page 3, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, Para. 221.B (September 15, 2020)..

<sup>305</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>306</sup> FSA Notice CFAP-7, page 4, para. 3.A, page 5, para. 4.A, (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, Para. 221.B (September 15, 2020).

<sup>307</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>308</sup> FSA Notice CFAP-7, page 4, para. 3.A, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, Para. 221.B (September 15, 2020).

must be fresh or processed. Payment rates for artichokes changed on July 10, 2020.<sup>309</sup>

**(g) Arugula**

Arugula was added as an eligible specialty crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>310</sup> Arugula greens are eligible. It is not clear whether all types of arugula are eligible. The intended use of the arugula must be fresh or processed.

**(h) Asparagus**

Asparagus is eligible as a specialty crop for CFAP.<sup>311</sup> It is not clear if all types of asparagus are eligible. The intended use of the asparagus must be fresh or processed. Payment rates for asparagus changed on July 10, 2020.<sup>312</sup>

**(i) Avocados**

Avocados are eligible as a specialty crop for CFAP.<sup>313</sup> It is not clear if all types of avocados are eligible. The intended use of the avocados must be fresh or processed.

**(j) Bananas**

All bananas are eligible as a specialty crop for CFAP.<sup>314</sup> Bananas were added as a change to CFAP rules on August 14, 2020.<sup>315</sup> The intended use of the bananas must be fresh or processed.

**(k) Basil**

Basil is eligible as a specialty crop for CFAP.<sup>316</sup> Basil was added as an eligible as a specialty crop for CFAP by a change in FSA rules on July 10, 2020.<sup>317</sup> It appears that all types of basil are eligible. The intended use of the basil must be fresh or processed.

<sup>309</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>310</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 3, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, Para. 221.B (September 15, 2020).

<sup>311</sup> FSA Notice CFAP-7, page 5, para. 4.A; (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>312</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>313</sup> FSA Notice CFAP-7, page 5, para. 4.A; (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>314</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,589, 49,552 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>315</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020)/

<sup>316</sup> FSA Notice CFAP-7, page 2, para. 2.A, page 3, para. 3.A (July 10, 2020); Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>317</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

**(l) Batatas**

Batatas is an eligible specialty crop for CFAP.<sup>318</sup> Batatas was added by a change to CFAP on August 14, 2020.<sup>319</sup> It is not clear if all types of batatas are eligible. It is also not clear if there are any restrictions based on the intended use of the batatas.

**(m) Beans**

Beans are eligible as a specialty crop for CFAP.<sup>320</sup> 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.

**(n) Bean Sprouts**

Bean sprouts were added as an eligible as a specialty crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>321</sup> It is not clear if all types of beans sprouts are eligible or if there are any restrictions for the intended use of the bean sprouts.

**(o) Beets**

Beets were added as an eligible as a specialty crop for CFAP by a change in CFAP rules on July 10, 2020.<sup>322</sup> All beets are eligible. The intended use of the beets must be fresh or processed.

**(p) Blackberries (Caneberries)**

Blackberries were added as an eligible specialty crop for CFAP by a change in CFAP rules on July 10, 2020.<sup>323</sup> All types of blackberries are eligible. The intended use of the blackberries must be fresh or processed.

**(q) Blueberries**

Blueberries are eligible as a specialty crop for CFAP.<sup>324</sup> All types of blueberries are eligible. The intended use of the blueberries must be

<sup>318</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,589, 49,552 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>319</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020).

<sup>320</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>321</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 3, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>322</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 3, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>323</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 3, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>324</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).



fresh or processed. Payment rates for blueberries changed on July 10, 2020.<sup>325</sup>

**(r) Bok Choy**

Bok Choy is eligible as a specialty crop for CFAP.<sup>326</sup> It was added in a change to CFAP on August 14, 2020.<sup>327</sup> Shanghai bok choy is the eligible type for CFAP. The intended use of the bok choy must be fresh or processed.

**(s) Broccoli**

Broccoli is eligible as a specialty crop for CFAP.<sup>328</sup> It is not clear if all types of broccoli are eligible specialty crops. The intended use for the broccoli must be fresh or processed.

**(t) Brussels Sprouts**

Brussels sprouts were added as an eligible as a specialty crop for CFAP in a change to CFAP rules on July 10, 2020.<sup>329</sup> It is not clear if all types of brussels sprouts are eligible specialty crops. The intended use of the brussels sprouts must be fresh or processed.

**(u) Cabbage**

Cabbage is eligible as a specialty crop for CFAP.<sup>330</sup> All types of cabbage are eligible. The intended use of the cabbage must be fresh or processed.

**(v) Cantaloupe**

Cantaloupe is eligible as a specialty crop for CFAP.<sup>331</sup> It is not clear if all types of cantaloupe are eligible specialty crops. The intended use of the cantaloupe must be fresh. Payment rates for cantaloupes changed on July 10, 2020.<sup>332</sup>

<sup>325</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>326</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (August 14, 2020).

<sup>327</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020)/

<sup>328</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, Para. 221.B (September 15, 2020).

<sup>329</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>330</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, Para. 221.B (September 15, 2020).

<sup>331</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>332</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

**(w) Carambola (Star Fruit)**

Carambola (star fruit) was added as an eligible specialty crop for CFAP on August 14, 2020.<sup>333</sup> It is not clear if all types of carambola are eligible. The intended use of the carambola must be fresh.

**(x) Carrots**

Carrots are eligible as a specialty crop for CFAP.<sup>334</sup> All types of carrots are eligible. The intended use for the carrots must be fresh or processed.

**(y) Cauliflower**

Cauliflower is eligible as a specialty crop for CFAP.<sup>335</sup> It is not clear if all types of cauliflower are eligible. The intended use for the cauliflower must be fresh or processed.

**(z) Celeriac (Celery Root)**

Celeriac (celery root) Brussel Sprouts were added as an eligible as a specialty crop for CFAP by a change in the CFAP rules.<sup>336</sup> It is not clear if all types of celeriac are eligible. The intended use of the celeriac must be fresh or processed.

**(aa) Celery**

Celery is eligible as a specialty crop for CFAP.<sup>337</sup> It is not clear if all types of celery are eligible. The intended use for the celery must be fresh or processed.

**(bb) Cherimoya**

Cherimoya is eligible as a specialty crop.<sup>338</sup> It was added as an eligible specialty crop for CFAP by a change in the CFAP rules on August 14, 2020.<sup>339</sup> It is not clear if all types of cherimoya are eligible. The intended use for the cherimoya must be fresh.

<sup>333</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>334</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>335</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>336</sup> FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>337</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>338</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>339</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020).

**(cc) Chervil French Parsley**

Chervil French parsley is eligible as a specialty crop for CFAP.<sup>340</sup> It was added as a specialty crop for CFAP by a change in the CFAP rules on August 14, 2020.<sup>341</sup> Chervil is the only type of French parsley that is eligible. The intended use for the chervil French parsley must be fresh or processed.

**(dd) Chives**

Chives, as an herb, were added as an eligible specialty crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>342</sup> All types of chives appear to be eligible. The intended use of the chives must be fresh or processed.

**(ee) Cilantro**

Cilantro was added as an eligible specialty crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>343</sup> Coriander, which was added as eligible for CFAP in a rule on August 14, 2020, is among the eligible types of cilantros.<sup>344</sup> The intended use of the cilantro must be fresh or processed.

**(ff) Citron**

Citron was added as an eligible specialty crop by a change in the CFAP rules on August 14, 2020.<sup>345</sup> It is not clear if all types of citron are eligible. The intended use for Citron must be fresh and processed.

**(gg) Coconuts**

Coconuts were added as a specialty eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>346</sup> It is not clear if all types of coconuts are eligible. The intended use of the coconuts must be fresh.

<sup>340</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>341</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020).

<sup>342</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-21, para. 221.B (September 15, 2020).

<sup>343</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,589; NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>344</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020); CFAP Handbook, page 8-22, para. 221.B (September 15, 2020).

<sup>345</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>346</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

**(hh) Collard Greens**

Collard greens were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>347</sup> It appears that all collards are eligible. The intended use of the collards can be fresh or processed.

**(ii) Cucumbers**

Cucumbers are eligible as a specialty crop for CFAP.<sup>348</sup> All types of cucumbers are eligible. The intended use for the cucumbers must be fresh or processed. Payment rates for cucumbers changed on July 10, 2020.<sup>349</sup>

**(ij) Curry Leaves**

Curry leaves were added as an eligible specialty crop by a change in the CFAP rules on August 14, 2020.<sup>350</sup> It is not clear whether or types of curry leaves are eligible, or what the intended use must be.

**(kk) Daikon Radish**

Daikon radish was made eligible as a specialty crop by a change in the CFAP rules on August 14, 2020.<sup>351</sup> All daikon radishes appear to be eligible. The intended use of daikon must be fresh.

**(ll) Dandelion Greens**

Dandelion greens were added as an eligible specialty crop by a change in the CFAP rules on July 10, 2020.<sup>352</sup> It appears that all types of dandelions are eligible. The intended use of the dandelion greens can be fresh or processed.

**(mm) Dates**

Dates are eligible as a specialty crop for CFAP as a result of a change in the CFAP rules on August 14, 2020.<sup>353</sup> It is not clear whether all

<sup>347</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>348</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>349</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>350</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>351</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>352</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>353</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

types of dates are eligible. The intended use of dates must be fresh or processed.

**(nn) Dill**

Dill is eligible as a specialty crop as a result of changes to CFAP on August 14, 2020.<sup>354</sup> All types of dill are eligible. The intended use of dill must be fresh or processed.

**(oo) Donqua (Winter Melon)**

Donqua (winter melon) is eligible as a specialty crop as of August 14, 2020.<sup>355</sup> It is not clear if all types of donqua are eligible or what the intended use must be.

**(pp) Dragon Fruit (Red Pitaya)**

Dragon fruit (red pitaya) is eligible as a specialty crop as a result of changes to the CFAP rules on August 14, 2020.<sup>356</sup> It is not clear whether all types are eligible. The intended use of dragon fruit must be fresh or processed.

**(qq) Endive Greens**

Endive greens are eligible as a specialty crop as a result of a change in the CFAP rules on August 14, 2020.<sup>357</sup> Only curly endive greens are eligible. The intended use of endive greens must be fresh or processed.

**(rr) Escarole Greens**

Escarole greens are eligible as a specialty crop for CFAP as of August 14, 2020.<sup>358</sup> All types of escarole are eligible. The escarole must have an intended use of fresh or processed.

**(ss) Eggplant**

Eggplant is eligible as a specialty crop for CFAP.<sup>359</sup> All types of eggplant are eligible. The intended use for the eggplant must be fresh or processed.

<sup>354</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>355</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>356</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>357</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>358</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (August 14, 2020).

<sup>359</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

**(tt) Filberts (Hazelnuts)**

Filberts (hazelnuts) are eligible as a specialty crop for CFAP after a change to the CFAP rules on August 14, 2020.<sup>360</sup> It is not clear what type of filberts are eligible or if there are any rules regarding the intended use of filberts.

**(uu) Frisee (Greens)**

Frisee greens are eligible as a specialty crop for CFAP based on a change in the CFAP rules on August 14, 2020.<sup>361</sup> Frisee and Belgian greens are the type that are eligible. The intended use of the frisee greens must be fresh or processed.

**(vv) Garlic**

Garlic is eligible as a specialty crop for CFAP.<sup>362</sup> All types of garlic are eligible, but garlic scapes are not eligible.<sup>363</sup> The intended use for the garlic must be fresh or processed. Payment rates for garlic changed on July 10, 2020.<sup>364</sup>

**(ww) Grapefruit**

Grapefruit is eligible as a specialty crop for CFAP.<sup>365</sup> All types of grapefruit are eligible. The intended use for the grapefruit must be fresh, juice, or processed.

**(xx) Greens (Not Already Listed)**

Greens were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>366</sup> All types of greens that are not listed separately are eligible as greens in general. The intended use of the greens can be fresh or processed.

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<sup>360</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>361</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>362</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>363</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020).

<sup>364</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>365</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>366</sup> FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

**(yy) Guava**

Guava was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>367</sup> It is not clear if all types of guava are eligible. The intended use of guava must be fresh or processed.

**(zz) Horseradish**

Horseradish is an eligible crop for CFAP based on a change in CFAP rules on August 14, 2020.<sup>368</sup> It is not clear if all types of horseradish are eligible. The intended use of horseradish must be fresh or processed.

**(aaa) Kale Greens**

Kale greens were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>369</sup> Only common kale greens and flowering kale greens are eligible. The intended use of the kale greens must be fresh or processed.

**(bbb) Kiwifruit**

Kiwifruit is eligible as a specialty crop for CFAP.<sup>370</sup> It is not clear if all types of kiwifruit are eligible specialty crops. The intended use for the kiwifruit must be fresh or processed. Payment rates for kiwifruit changed on July 10, 2020.<sup>371</sup>

**(ccc) Kohlrabi**

Kohlrabi is an eligible specialty crop based on a change to the CFAP rules on August 14, 2020.<sup>372</sup> It is not clear if all types of kohlrabi are eligible specialty crops. The intended use for leeks must be fresh.

<sup>367</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>368</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>369</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>370</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>371</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>372</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

**(ddd) Kumquats**

Kumquats are an eligible specialty crop based on a change to the CFAP rules on August 14, 2020.<sup>373</sup> It is not clear if all types of kumquats are eligible specialty crops. The intended use for kumquats must be fresh or processed.

**(eee) Leeks**

Leeks are an eligible specialty crop based on a change to the CFAP rules on August 14, 2020.<sup>374</sup> It is not clear if all types of leeks are eligible specialty crops. The intended use for leeks must be fresh.

**(fff) Lemons**

Lemons are eligible as a specialty crop for CFAP.<sup>375</sup> It is not clear if all types of lemons are eligible specialty crops. The intended use for the lemons must be fresh or processed.

**(ggg) Boston Lettuce**

Boston lettuce was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>376</sup> Only Boston lettuce is eligible in this category. The intended use for the Boston lettuce must be fresh or processed.

**(hhh) Green Leaf Lettuce**

Green leaf lettuce was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>377</sup> Only green leaf lettuce is eligible in this category. The intended use for the Boston lettuce must be fresh.

**(iii) Iceberg Lettuce**

Iceberg lettuce is eligible as a specialty crop for CFAP.<sup>378</sup> The type of iceberg lettuce must be crisphead. The intended use of the iceberg lettuce must be fresh.

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<sup>373</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); FSA Notice CFAP-7, page 2, para. 2.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>374</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, Para. 221.B (September 15, 2020).

<sup>375</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, Para. 221.B (September 15, 2020).

<sup>376</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>377</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>378</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, Para. 221.B (September 15, 2020).



**(jjj) Lolla Rossa Lettuce**

Lolla Rossa lettuce was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>379</sup> Only leafy Lolla Rossa lettuce is eligible in this category. The intended use for the Lolla Rossa lettuce must be fresh.

**(kkk) Oak Leaf Green Lettuce**

Oak leaf green lettuce was added as an eligible crop for CFAP by a change in the FSA rules on July 10, 2020.<sup>380</sup> Only leafy oak leaf green lettuce is eligible in this category. The intended use for the oakleaf green lettuce must be fresh.

**(lll) Oak Leaf Red Lettuce**

Oak leaf red lettuce was added as an eligible crop for CFAP by a change in the FSA rules on July 10, 2020.<sup>381</sup> Only leafy oak leaf red lettuce is eligible in this category. The intended use for the oakleaf red lettuce must be fresh.

**(mmm) Red Leaf Lettuce**

Red leaf lettuce was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>382</sup> Only red leaf lettuce is eligible in this category. The intended use for the red leaf lettuce must be fresh.

**(nnn) Romaine Lettuce**

Romaine lettuce is eligible as a specialty crop for CFAP.<sup>383</sup> The type of lettuce must be romaine. The intended use of the romaine lettuce must be fresh.

<sup>379</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>380</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>381</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>382</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

<sup>383</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22, para. 221.B (September 15, 2020).

**(ooo) Maple Sap**

Maple sap is an eligible specialty crop under CFAP based on changes to the program made on August 14, 2020.<sup>384</sup> Only maple syrup is eligible. The intended use of the maple sap must be processed.

**(ppp) Marjoram**

Marjoram was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>385</sup> It appears that all types of marjoram are eligible in this category. The intended use for the marjoram must be fresh or processed.

**(qqq) Mesculin (or Musculin) Mix**

Mesculin, or musculin, mix is an eligible specialty crop for CFAP based on changes in the CFAP rules on August 14, 2020.<sup>386</sup> It is not clear if all types of mesculin are eligible or if there are any restrictions on the intended use of the mix.

**(rrr) Microgreens (All Other)**

All other microgreens not otherwise in a CFAP category are also eligible as a specialty crop based on changes to the CFAP rules made on August 14, 2020.<sup>387</sup> It is not clear if all types of microgreens are eligible or if there are any restrictions on the intended use of microgreens.

**(sss) Mint**

Mint, raised as an herb, was added as an eligible crop for CFAP by a change in the FSA CFAP rules on July 10, 2020.<sup>388</sup> All types of mint are eligible in this category. The intended use for the mint must be fresh or processed.

**(ttt) Peppermint**

Peppermint, raised as an herb, is a specialty crop for CFAP as a result in changes to the CFAP rules on August 14, 2020 that divided mint

<sup>384</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>385</sup> F NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); SA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, Para. 221.B (September 15, 2020).

<sup>386</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>387</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>388</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

into three separate categories—peppermint, spearmint, and other mint.<sup>389</sup> It is not clear if all types of peppermint are eligible. The intended use of the peppermint must be fresh or processed.

#### **(uuu) Spearmint**

Spearmint as an herb is eligible for CFAP as a specialty crop as a result of a change in the CFAP rules on August 14, 2020 that divided mint into three separate categories—spearmint, peppermint, and other mint.<sup>390</sup>

#### **(vvv) Mushrooms**

Mushrooms are eligible as a specialty crop for CFAP.<sup>391</sup> All types of mushrooms are eligible. The intended use for the mushrooms must be fresh or processed. Payment rates for mushrooms changed on July 10, 2020.<sup>392</sup>

#### **(www) Mustard Greens**

Mustard greens were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>393</sup> All types of mustard greens are eligible in this category. The intended use for the mustard greens must be fresh or processed.

#### **(xxx) Nectarines**

Nectarines are an eligible CFAP specialty crop based on changes to the CFAP rules on August 14, 2020.<sup>394</sup> All nectarines are eligible in this category. The intended use of the nectarines must be fresh or processed.

#### **(yyy) Okra**

Okra was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>395</sup> It is not clear if all types of okra are eligible. The intended use for okra must be fresh or processed.

<sup>389</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>390</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>391</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>392</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>393</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 2, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>394</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>395</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

**(zzz) Dry Onions**

Dry Onions are eligible as a specialty crop for CFAP.<sup>396</sup> All onions except green onions fit into this category. The intended use for the dry onions must be fresh or processed.

**(aaaa) Green Onions**

Green onions are eligible as a specialty crop for CFAP.<sup>397</sup> All green onions fit into this category. The intended use for the green onions must be fresh or processed.

**(bbbb) Oranges**

Oranges are eligible as a specialty crop for CFAP.<sup>398</sup> All types of oranges are eligible. The intended use for the oranges must be fresh, juice, or processed.

**(cccc) Oregano**

Oregano was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>399</sup> All types of oregano appear to be eligible. The intended use for oregano must be fresh or processed.

**(dddd) Papaya**

Papaya is eligible as a specialty crop for CFAP.<sup>400</sup> All types of papaya are eligible. The intended use for the papaya must be fresh or processed. Payment rates for papaya changed on July 10, 2020.<sup>401</sup>

**(eeee) Parsley**

Parsley that is used as an herb and that is not in another CFAP category is also eligible as a specialty crop.<sup>402</sup> It was added as a category in a change of CFAP rules on August 14, 2020.<sup>403</sup> The intended use for the parsley must be fresh or processed. The intended use for the parsley must be fresh or processed.

<sup>396</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>397</sup> Second CFAP Correction, 85 C.F.R. 49, 594, 594 (to be codified at 7 C.F.R. § 9.4) (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>398</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>399</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>400</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>401</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>402</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>403</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,952 (August 14, 2020).

**(ffff) Parsnips**

Parsnips were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>404</sup> It is not clear if all types of parsnips are eligible. The intended use for parsnips must be fresh or processed.

**(gggg) Passion Fruit**

Passion Fruit was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>405</sup> It is not clear if all types of passion fruit are eligible. The intended use for passion fruit must be fresh.

**(hhhh) Peaches**

Peaches are eligible as a specialty crop for CFAP.<sup>406</sup> All types of peaches are eligible. The intended use for the peaches must be fresh or processed. Payment rates for peaches changed on July 10, 2020.<sup>407</sup>

**(iiii) Pears**

Pears are eligible as a specialty crop for CFAP.<sup>408</sup> All types of pears are eligible. The intended use for the pears must be fresh, juice, or processed.

**(jjjj) Green Peas**

Green Peas were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>409</sup> English/garden, snap, sugar, and snow green peas are eligible. The intended use for green peas must be fresh or processed.

**(kkkk) Pecans**

Pecans are eligible as a specialty crop for CFAP.<sup>410</sup> All types of pecans are eligible. It is not clear if there are any intended use limits for pecan eligibility.

<sup>404</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>405</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>406</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>407</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>408</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>409</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>410</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

### **(llll) Bell Peppers—Green Only**

Bell peppers are eligible as a specialty crop for CFAP.<sup>411</sup> Only green bell peppers are eligible in this category. The intended use for the green bell peppers must be fresh or processed.

### **(mmmm) Peppers—Not Green Bell Peppers**

Peppers are eligible as a specialty crop for CFAP.<sup>412</sup> All peppers, except green bell peppers, are eligible in this category. The intended use for the peppers must be fresh or processed.

### **(nnnn) Persimmons**

Persimmons are eligible as a specialty crop for CFAP due to a change in CFAP rules on August 14, 2020.<sup>413</sup> It is not clear if all types of persimmon are eligible. The intended use of the persimmon must be fresh or processed.

### **(oooo) Pineapples**

Pineapples were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>414</sup> All types of pineapples are eligible. It is not clear if there are restrictions on the intended use of the pineapples.

### **(pppp) Pistachios**

Pistachios were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>415</sup> It is not clear if all types of pistachios are eligible or if there are any restrictions based on the intended use of the pistachios.

### **(qqqq) Plantains**

Plantains are eligible as a CFAP specialty crop as a result of changes in the CFAP rules on August 14, 2020.<sup>416</sup> It is not clear if all types of

<sup>411</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>412</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>413</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>414</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>415</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>416</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

plantains are eligible. The intended use of the plantains must be fresh or processed.

#### **(rrrr) Pomegranates**

Pomegranates are eligible as a CFAP specialty crop as a result of a change in CFAP rules on August 14, 2020.<sup>417</sup> It is not clear if all types of pomegranates are eligible. The intended use of the pomegranates must be fresh or processed.

#### **(ssss) Fresh Russet Potatoes**

Fresh Russet potatoes were added as a separate eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>418</sup> All varieties of fresh Russet potatoes are eligible in this category. The intended use of fresh Russet potatoes must be fresh. Previously, a general category of potatoes were eligible.

#### **(tttt) Fresh Potatoes—Other**

Fresh potatoes—other than Russets—were added as a separate eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>419</sup> All varieties of fresh potatoes that are not Russets are eligible in this category. The intended use of fresh potatoes in this category must be fresh.

#### **(uuuu) Processing Potatoes**

Processing potatoes were added as a separate eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>420</sup> All processing potatoes are eligible. The intended use of the potatoes must be processing. Previously, a general category of potatoes were eligible.

#### **(vvvv) Seed Potatoes**

Seed potatoes were added as a separate eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>421</sup> All seed potatoes are

<sup>417</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>418</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321 (July 10, 2020); FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>419</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321 (July 10, 2020); FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>420</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321 (July 10, 2020); FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>421</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321 (July 10, 2020); FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

eligible. The intended use of these potatoes must be seeds. Previously, a general category of potatoes were eligible.

#### **(www) Pummelos**

Pummelos are eligible as a CFAP specialty crop as a result of changes in the CFAP rules on August 14, 2020.<sup>422</sup> It is not clear if all types of pummelos are eligible. The intended use of the pummelos must be fresh or processed.

#### **(xxxx) Pumpkins**

Pumpkins are eligible as a CFAP specialty crop as a result of a change in CFAP rules on August 14, 2020.<sup>423</sup> All types of pumpkins are eligible. The intended use of the pumpkins must be fresh or processed.

#### **(yyyy) Radicchio**

Radicchio was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>424</sup> Common and Witloof radicchios are eligible. The intended use of the radicchios must be fresh.

#### **(zzzz) Raspberries (Caneberries)**

Raspberries (caneberries) are eligible as a specialty crop for CFAP.<sup>425</sup> The type must be either black or red. It is not clear if there are any intended use restrictions for these berries. Payment rates changed on July 10, 2020.<sup>426</sup>

#### **(aaaaa) Rhubarb**

Rhubarb is eligible as a specialty crop for CFAP.<sup>427</sup> 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. Payment rates changed on July 10, 2020.<sup>428</sup>

<sup>422</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>423</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.5, para. 221.B (September 15, 2020).

<sup>424</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>425</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>426</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>427</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>428</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).



**(bbbbbb) Rosemary**

Rosemary was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>429</sup> It appears that all types of rosemary are eligible. The intended use for the rosemary must be fresh or processed.

**(ccccc) Rutabagas**

Rutabagas are eligible as a CFAP specialty crop as a result of a change to the CFAP rules on August 14, 2020.<sup>430</sup> It is not clear if all rutabaga types are eligible. The intended use for the rutabagas must be fresh or processed.

**(ddddd) Sage**

Sage as an herb was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>431</sup> It appears that all types of sage are eligible. The intended use for the sage must be fresh or processed.

**(eeeeee) Sapote**

Sapote is eligible as a CFAP specialty crop due to a change in CFAP rules on August 14, 2020.<sup>432</sup> Mamey is the type of sapote that is eligible. The intended use for the sapote must be fresh or processed.

**(fffff) Savory**

Savory was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>433</sup> It appears that all types of savory are eligible. The intended use for the savory must be fresh or processed.

**(ggggg) Shallots**

Shallots are eligible as a CFAP specialty crop due to a change in CFAP rules on August 14, 2020.<sup>434</sup> It is not clear if all types of shallot are eligible. The intended use of shallots must be fresh.

<sup>429</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>430</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>431</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>432</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>433</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>434</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

**(hhhhh) Sorrell Greens**

Sorrell greens were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>435</sup> It appears that all types of sorrell are eligible. The intended use for the sorrell must be fresh or processed.

**(iiii) Spinach Greens**

Spinach greens are eligible as a specialty crop for CFAP.<sup>436</sup> 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.

**(jjjj) Squash**

Squash is eligible as a specialty crop for CFAP.<sup>437</sup> All types of squash are eligible, including zucchini.<sup>438</sup> The intended use for the squash must be fresh or processed.<sup>439</sup>

**(kkkkk) Strawberries**

Strawberries are eligible as a specialty crop for CFAP.<sup>440</sup> 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.

**(llll) Table Sugarcane**

Table sugarcane was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>441</sup> It is not clear if all types of table sugarcane are eligible. The intended use for the stable sugarcane must be fresh.

**(mmmmm) Sweet Corn**

Sweet corn is eligible as a specialty crop for CFAP.<sup>442</sup> 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.

<sup>435</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>436</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>437</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>438</sup> See NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,589 (August 14, 2020).

<sup>439</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>440</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>441</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>442</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

**(nnnnn) Sweet Potatoes**

Sweet potatoes are eligible as a specialty crop for CFAP.<sup>443</sup> All types of sweet potatoes are eligible. The intended use for the sweet potatoes must be fresh or processed.

**(ooooo) Swiss Chard (Greens)**

Swiss chard was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>444</sup> Green Swiss chard and red Swiss chard are eligible types. The intended use for the tangerines must be fresh or processed.

**(ppppp) Tangelos**

Tangelos are eligible as a specialty crop for CFAP due to a change in the CFAP rules on August 14, 2020.<sup>445</sup> All types of tangelos are eligible. The intended use of the tangelos must be fresh, juice, or processed.

**(qqqqq) Tangerines**

Tangerines are eligible as a specialty crop for CFAP.<sup>446</sup> All types of tangerines are eligible. The intended use for the tangerines must be fresh, juice, or processed. Payment rates for tangerines changed on July 10, 2020.<sup>447</sup>

**(rrrrr) Taro**

Taro is eligible as a specialty crop for CFAP.<sup>448</sup> All types of taro are eligible. The intended use for the taro must be fresh or processed. Payment rates for taro changed on July 10, 2020.

<sup>443</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>444</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>445</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>446</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>447</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020).

<sup>448</sup> FSA Notice CFAP-7, page 5, para. 4.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

**(sssss) Thyme**

Thyme was added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>449</sup> All types of thyme appear to be eligible. The intended use for the thyme must be fresh or processed.

**(ttttt) Tomatoes**

Tomatoes are eligible as a specialty crop for CFAP.<sup>450</sup> All types of tomatoes are eligible. The intended use for the tomatoes must be fresh or processed.

**(uuuuu) Turmeric**

Turmeric is eligible as a CFAP specialty crop as a result of a change in the CFAP rules on August 14, 2020.<sup>451</sup> All types of turmeric are eligible. The intended use for the turmeric must be fresh or processed.

**(vvvvv) Turnip Top Greens**

Turnip top greens were added as an eligible crop for CFAP by a change in the CFAP rules on July 10, 2020.<sup>452</sup> The greens must be turnips. The intended use for the turnip top greens must be fresh or processed.

**(wwwww) Turnips**

Turnips are eligible as a CFAP specialty crop as a result in a change in the CFAP rules on August 14, 2020.<sup>453</sup> Hybrid and open pollinated are the types of turnips that are eligible. The intended use of the turnips must be fresh or processed.

**(xxxxx) Walnuts**

Walnuts are eligible as a specialty crop for CFAP.<sup>454</sup> All types of walnuts are eligible. It is not clear if there are any restrictions on the intended use for walnuts.

<sup>449</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>450</sup> CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>451</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>452</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,321-41,322 (July 10, 2020); FSA Notice CFAP-7, page 3, para. 2.A, page 4, para. 3.A (July 10, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>453</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.6, para. 221.B (September 15, 2020).

<sup>454</sup> Second CFAP Correction, 85 Fed. Reg. 49,594 (to be codified at 7. C.F. R. 9.4 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.7, para. 221.B (September 15, 2020).

**(yyyyy) Upland and Winter Cress**

Upland and winter cress are eligible specialty crops for CFAP as a result of changes in the CFAP rules on August 14, 2020.<sup>455</sup> It is not clear if there are any restrictions on the intended use for the upland and winter cress.

**(zzzzz) Watercress**

Watercress is eligible as a CFAP specialty crop as a result of a change in the CFAP rules on August 14, 2020.<sup>456</sup> It is not clear if all types of watercress are eligible. The intended use of the watercress must be fresh or processed.

**(aaaaa) Watermelon**

Watermelon appears to be eligible as a specialty crop for CFAP.<sup>457</sup> All types of watermelon appear to be eligible. The intended use for the watermelon must be fresh or processed. The payment rates for watermelon changed on August 14, 2020.<sup>458</sup>

**(bbbbbb) Yautia/Malanga (Dasheen)**

Yautia/Malanga (Dasheen) is eligible as a CFAP specialty crop as a result in a change to the CFAP rules on August 14, 2020.<sup>459</sup> It is not clear if there are restrictions on the type that is eligible. The intended use for the crop must be fresh.

**(ccccc) Yuca (Cassava)**

Yuca (cassava) is eligible as a CFAP specialty crop as a result of a change in CFAP rules on August 14, 2020.<sup>460</sup> All types of Yuca are eligible. The intended of the yuca must be fresh.

<sup>455</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.7, para. 221.B (September 15, 2020).

<sup>456</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.7, para. 221.B (September 15, 2020).

<sup>457</sup> Second CFAP Correction, 85 Fed. Reg. 49,594 (to be codified at 7. C.F. R. 9.4 (August 14, 2020)); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.7, para. 221.B (September 15, 2020).

<sup>458</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,950 (August 14, 2020).

<sup>459</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.7, para. 221.B (September 15, 2020).

<sup>460</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 2-12.5, para. 21.A, page 8-22.7, para. 221.B (September 15, 2020).

## 6. Aquaculture

Aquaculture is now eligible for CFAP.<sup>461</sup> The addition of aquaculture took place with a change to the CFAP rules on August 14, 2020.<sup>462</sup>

USDA has long suggested that aquaculture would eventually be eligible for CFAP.<sup>463</sup> Previously, USDA categorized aquaculture as a value-loss crop, which it defined as a commodity that does not lend itself to production-based situations.<sup>464</sup> It appears, however, that now that USDA officially added aquaculture as an eligible commodity it is no longer categorized as a value-loss crop.<sup>465</sup>

The following sections outline the eligibility of aquaculture for CFAP.

### *a. General Eligibility Requirements*

In general, USDA sees as possibly-eligible aquaculture businesses those that grow with either freshwater or saltwater in controlled environments.<sup>466</sup> This can include raceways, ponds, tanks, and recirculating systems.

### *b. Eligible Species of Aquaculture*

USDA has identified several aquaculture species as eligible.<sup>467</sup>

#### *(i) Crawfish/Crayfish*

Crawfish, which USDA sometimes refers to as crayfish, are eligible for CFAP.<sup>468</sup>

<sup>461</sup> CFAP Handbook, page 2-12, para. 21.A, page 7.5-7, para. 207.A (September 15, 2020); USDA, Aquaculture and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/aquaculture>.

<sup>462</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-1, para. 205.A-B (August 14, 2020).

<sup>463</sup> NOFA, 85 Fed. Reg. 31,062, 31,063-31,064 (May 22, 2020); CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); USDA, Coronavirus Food Assistance Program, Ineligible Commodities and Request for Additional Commodities (May 26, 2020)..

<sup>464</sup> See CFAP Handbook, page 7-1, para. 200.A (May 22, 2020). This definition is similar to the definition of value-loss crops that is used in other programs. See, for example, FSA Handbook, Noninsured Crop 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).

<sup>465</sup> See, for example, NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, pages 7.5-1 and 7.5-2, para. 205 (September 15, 2020).

<sup>466</sup> Third CFAP Rule Correction, 85 Fed. Reg. 49,593, 49,594 (to be codified at 7 C.F.R. 9.5(j)) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>467</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>468</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

**(ii) Catfish**

Catfish that are sold for foodfish are eligible for CFAP.<sup>469</sup>

**(iii) Largemouth Bass**

Largemouth bass that are sold live as foodfish are eligible for CFAP.<sup>470</sup>

**(iv) Carp**

Carp that are sold live as foodfish are eligible for CFAP.<sup>471</sup>

**(v) Hybrid Striped Bass**

Hybrid striped bass that are sold for foodfish are eligible for CFAP.<sup>472</sup>

**(vi) Red Drum**

Red drum that are sold for foodfish are eligible for CFAP.<sup>473</sup>

**(vii) Salmon**

Salmon that are sold for foodfish are eligible for CFAP.<sup>474</sup>

**(viii) Sturgeon**

Sturgeon that are sold for foodfish are eligible for CFAP.<sup>475</sup>

**(ix) Tilapia**

Tilapia that are sold for foodfish are eligible for CFAP.<sup>476</sup>

<sup>469</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>470</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>471</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>472</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>473</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>474</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>475</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>476</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

**(x) Trout**

Trout that are sold for foodfish are eligible for CFAP.<sup>477</sup>

**(xi) Ornamentals and Tropicals**

Ornamentals and tropicals that are propagated especially for the pet trade are eligible for CFAP.<sup>478</sup>

**(xii) Recreational Sportfish**

Recreational sportfish that are propagated especially for recreational purposes in a controlled environment are eligible for CFAP.<sup>479</sup>

**c. Species of Aquaculture NOT Eligible**

All aquaculture species not listed above are not eligible for CFAP.<sup>480</sup> In particular, oysters, clams, mussels, scallops, and marine algae are not eligible.<sup>481</sup> Fingerling catfish, as opposed to catfish for food fish, are also not eligible.<sup>482</sup> In addition, wild caught aquaculture commodities are not eligible.<sup>483</sup>

**d. Eligible Losses of Aquaculture**

Three types of losses for aquaculture are recognized under CFAP.<sup>484</sup> Not all aquaculture species are eligible for each type of loss.

**(i) Sold Inventory—Crayfish, Largemouth Bass, Carp, and Salmon Only**

The aquaculture species of crayfish, largemouth bass, carp, and salmon that were sold between January 15, 2020, and April 15, 2020, are eligible for CFAP.<sup>485</sup> These are the only species of aquaculture currently eligible under this category. Farmers must certify their ownership interest in the inventory sold between January 15, 2020, and April 15, 2020. For these species, USDA determined there was a price decline of 5 percent or greater during the time period of January 15, 2020 through April 15, 2020, and USDA has set a payment rate for those losses accordingly.

<sup>477</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>478</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>479</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>480</sup> CFAP Handbook, page 7.5-7, para. 207.A (August 14, 2020).

<sup>481</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,594 (to be codified at 7 C.F.R. § 9.5(j)(2)) (August 14, 2020).

<sup>482</sup> CFAP Handbook, page 7.5-9, para. 207.D (September 15, 2020).

<sup>483</sup> CFAP Handbook, page 7.5-7, para. 207.A (September 15, 2020).

<sup>484</sup> CFAP Handbook, page 7.5-8, para. 207.B (September 15, 2020).

<sup>485</sup> CFAP Handbook, page 7.5-8, para. 207.B-C (September 15, 2020).



Certain types of aquaculture are not eligible as sold aquaculture inventory. This includes inventory that is normally culled in advance of shipping or upon delivery.<sup>486</sup> Inventory that was under an agreed upon price before January 15, 2020, and payment was or will be made at that price or higher is also not eligible. This is true even if the crop was sold between January 15, 2020, and April 15, 2020.

### **(ii) Market-Size Inventory Not Sold**

Also eligible for CFAP are all eligible aquaculture species, except for crayfish, that were of market weight but went unsold between January 15, 2020, to April 15, 2020.<sup>487</sup> For this form of loss, farmers need to certify their ownership interest in their highest inventory of market ready fish. They will select a date between January 15, 2020, and April 15, 2020, for this purpose.

Under this category, aquaculture inventory that was not market ready is not eligible.<sup>488</sup> Also not eligible is inventory that is normally culled in advance of shipping or upon delivery. Finally, fingerling catfish, as opposed to catfish for foodfish, are not eligible.

### **(iii) Inventory Not Sold Due to Lack of Market—Crayfish only**

One type of aquaculture loss applies only to eligible crayfish. This loss is for crayfish that were propagated in a controlled environment, but which were not sold as of April 15, 2020—and will not be sold in 2020—because of a lack of market.<sup>489</sup>

## **7. Nursery and Floriculture**

Nursery and floriculture crops are now eligible for CFAP.<sup>490</sup> This change took place with a Federal Register notice and an FSA CFAP Handbook amendment dated August 14, 2020.<sup>491</sup>

USDA has long suggested that nursery crops would eventually be eligible for CFAP.<sup>492</sup> Previously, USDA categorized nursery crops as value-loss crops, which it defined as

<sup>486</sup> CFAP Handbook, page 7.5-8, para. 207.B (September 15, 2020).

<sup>487</sup> CFAP Handbook, pages 7.5-8 and 7.5-9, para. 207.B, D (September 15, 2020).

<sup>488</sup> CFAP Handbook, page 7.5-9, para. 207.D (September 15, 2020).

<sup>489</sup> CFAP Handbook, page 7.5-10, para. 207.E (September 15, 2020).

<sup>490</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 2-12, para. 21.A, pages 7.5-12 through 7.5-17, para. 208 (September 15, 2020); USDA, Nursery Crops and the Coronavirus Food Assistance Program (September 17, 2020), at: <https://www.farmers.gov/cfap1/nursery>.

<sup>491</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 2-12, para. 21.A (August 14, 2020); USDA, Nursery Crops and the Coronavirus Food Assistance Programs (September 17, 2020).

<sup>492</sup> NOFA, 85 Fed. Reg. 31,062, 31,063-31,064 (May 22, 2020); CFAP Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments); USDA, Coronavirus Food Assistance Program, Ineligible Commodities and Request for Additional Commodities (May 26, 2020).

being commodities that do not lend themselves to production-based situations.<sup>493</sup> It appears, however, that now that USDA officially added nursery and floriculture as eligible commodities, they are longer being categorized as value-loss crops.<sup>494</sup>

The following sections outline the eligibility of nursery and floriculture crops.

### ***a. Nursery and Floriculture Defined***

USDA defines a nursery crop as a decorative or nondecorative plant that is grown in a container or a controlled environment and is for commercial sale.<sup>495</sup>

Floriculture is defined as cut flowers and cut greenery that is from annual and perennial flowering plants that are grown in a container or a controlled environment for commercial sale.<sup>496</sup> Cut flowers includes cut flowers and cut greenery from annual and perennial flowering plants grown in a container or controlled environment for commercial sale.<sup>497</sup>

A controlled environment is also defined by USDA.<sup>498</sup>

### ***b. Eligible Losses of Nursery and Floriculture***

In general, there are two ways that nursery and floriculture crops become eligible for CFAP.

#### ***(i) Delivered and Unpaid***

Nursery and floriculture commodities can be eligible if they were delivered but the farmer remains unpaid.<sup>499</sup> This can mean that the commodities were shipped but spoiled. It can also mean that they were shipped but remain unpaid due to a loss of marketing channels. Only nursery and floriculture that were delivered between January 15, 2020, and April 15, 2020, and for which no payment was received or will be

<sup>493</sup> See CFAP Handbook, page 7-1, para. 200.A (May 22, 2020). This definition is similar to the definition of value-loss crops that is used in other programs. See, for example, FSA Handbook, Noninsured Crop 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).

<sup>494</sup> See, for example, NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, pages 7.5-1 and 7.5-2, para. 205 (September 15, 2020).

<sup>495</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020); CFAP Handbook, page 7.5-12, para. 208.A, Exhibit 2, page 2, "Nursery" (September 15, 2020).

<sup>496</sup> CFAP Handbook, page 7.5-12, para. 208.A, Exhibit 2, page 2, "Floriculture" (September 15, 2020).

<sup>497</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (September 15, 2020).

<sup>498</sup> A controlled environment is an environment, with respect to crops, including ornamental nursery, aquaculture (including ornamental fish), and floriculture, in which everything that can practically be controlled by the producer with structure, facilities, growing media, such as water, soil, and nutrients is in fact controlled by the producer as determined by industry standards. CFAP Handbook, Exhibit 2, page 1, "Controlled Environment" (September 15, 2020).

<sup>499</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-12, para. 208.B (September 15, 2020).

received are eligible.<sup>500</sup> If the commodity was donated and no payment was received by the farmer the inventory is eligible.

When applying for CFAP, the farmer must certify that the farmer had an ownership interest in the wholesale value of the nursery or floriculture commodities.<sup>501</sup>

## **(ii) Not Delivered**

Nursery and floriculture commodities can also be eligible for CFAP if they were not delivered.<sup>502</sup> The commodities must have failed to leave the farm between January 15, 2020, and April 15, 2020, due to a complete loss of marketing channels. Commodities that were donated or destroyed due to the COVID-19 pandemic are also eligible.<sup>503</sup> The eligible loss is based on the wholesale value of the farmer's nationwide inventory for each eligible commodity.

## **c. Ineligible Nursery and Floriculture**

Certain types of nursery and floriculture are not eligible for CFAP. This includes nursery or floriculture commodities that are in inventory or storage and which may be sold after April 15, 2020.<sup>504</sup> Inventory that is normally culled in advance of shipping or upon delivery also is not eligible. In addition, inventory sold at a discount price is not eligible for CFAP.

## **d. Certification of Nursery and Floriculture Values**

When applying for CFAP, the farmer or an authorized representative of the farmer will need to certify to the wholesale value of the share of inventory that the farmer owns.<sup>505</sup> For inventory that was shipped and then spoiled or was unpaid, the wholesale value of the shipment that was made between January 15, 2020, and April 15, 2020 is the value the farmer should report. For inventory that was never sold, the wholesale value of the commodities as of April 15, 2020 should be reported.

FSA has the power to ask for evidence of inventories or sales if FSA feels it has a reason to question the ownership interest or the quantity of the farmer's inventory.<sup>506</sup> FSA can ask for evidence of the inventory or a sale, and may ask for evidence of wholesale prices. FSA may also adjust the value of inventory that spoiled or went unpaid, or the value of the inventory not sold, if FSA thinks the quantity is unreasonable or not accurate. In addition, FSA may change the values to reflect the actual wholesale value rather than the retail value.

<sup>500</sup> CFAP Handbook, page 7.5-13, para. 208.C (September 15, 2020).

<sup>501</sup> CFAP Handbook, page 7.5-13, para. 208.C, page 7.5-15, para. 208.E (September 15, 2020).

<sup>502</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, pages 7.5-12 and 7.5-14, para. 208.B, D (August 14, 2020).

<sup>503</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (prefatory remarks) (August 14, 2020); CFAP Handbook, page 7.5-14, para. 208.D (August 14, 2020).

<sup>504</sup> CFAP Handbook, pages 7.5-13 and 7.5-14, para. 208. C-D (September 15, 2020).

<sup>505</sup> CFAP Handbook, pages 7.5-13, through 7.5-15, para. 208.C-E (September 15, 2020).

<sup>506</sup> CFAP Handbook, page 7.5-15, para. 208.F (September 15, 2020).

## D. Ineligible Commodities and the Addition of New Commodities

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 September 11, 2020, this includes some of the most widely raised commodities in the country: (1) goats for meat; (2) soft red winter wheat; (2) hard red winter wheat; (3) white wheat; (4) rice; (5) flax; (6) rye; (7) peanuts; (8) feed barley; (9) Extra Long Staple (ELS) cotton; (10) alfalfa; (11) forage crops; (12) hemp; and (16) tobacco.<sup>507</sup> In addition, poultry are not eligible.<sup>508</sup> There are many others.

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.

USDA believes CARES Act money (about 9.5 billion dollars) can be used to compensate farmers for losses with a 5 percent or greater price decline between mid-January 2020 and mid-April 2020, and for specialty crops that were shipped and spoiled or went unpaid.<sup>509</sup>

USDA believes the CCC Charter Act authorizes 6.5 billion dollars to compensate farmers for “losses due to on-going market disruptions.”<sup>510</sup> 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.”<sup>511</sup>

When the rules for CFAP were first published, it appeared that USDA based many of its commodity-eligibility decisions on whether or not the commodity suffered a 5-percent-or-greater national price decline between mid-January 2020 and mid-April 2020.<sup>512</sup> With new CFAP rules published on July 10, 2020, and August 14, 2020, USDA responded to

<sup>507</sup> For ELS cotton, other types of wheat, tobacco, hemp, feed barley, alfalfa, goats, and green peanuts, see NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,590 (prefatory remarks) (August 14, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program: Consideration of Additional Commodities (May 2020); USDA, Coronavirus Food Assistance Program, “What Commodities Are Ineligible? Why?” (September 17, 2020), at: <https://www.farmers.gov/cfap1>.

<sup>508</sup> 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 (September 15, 2020).

<sup>509</sup> CFAP Handbook, page 8-1, para. 211.A (September 15, 2020); USDA, Coronavirus Food Assistance Program FAQ, “How will CFAP help agricultural producers impacted by the COVID-19 Pandemic?” (September 29, 2020); USDA, Coronavirus Food Assistance Program, Background on CFAP (May 26, 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. NOFA, CFAP Additional Commodities Request for Information, 85 Fed. Reg. 31,062, 31,062-31,063 (May 29, 2020). For the CARES Act language, see CARES Act (Division B, Title I).

<sup>510</sup> USDA, Coronavirus Food Assistance Program FAQ, “How will CFAP help agricultural producers impacted by the COVID-19 Pandemic?” (September 29, 2020); USDA, Coronavirus Food Assistance Program, “What are CFAP Funding and Authorities” (September 17, 2020); see also 15 U.S.C. §§ 714b, 714d, 714e.

<sup>511</sup> USDA, Coronavirus Food Assistance Program FAQ, “How will CFAP help agricultural producers impacted by the COVID-19 Pandemic?” (September 29, 2020).

<sup>512</sup> For example, see NOFA, CFAP Additional Commodities Request for Information, 85 Fed. Reg. 31,062, 31,063 (May 22, 2020).

comments expressing that certain commodities should be eligible “even when no price decrease was identified because they were affected by market chain disruptions.”<sup>513</sup> Accordingly, USDA made dozens of additional specialty crops eligible for CFAP based exclusively on market chain disruptions. The Second Edition of FLAG's Farmers' Guide to the Coronavirus Food Assistance Program outlines in greater detail the process by which it appears USDA has approached making commodity-eligibility determinations.<sup>514</sup>

## 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 and deadlines.

### A. Sign-Up Deadline: September 11, 2020 with Some Exceptions

USDA began accepting CFAP 1 applications on May 26, 2020.<sup>515</sup> The current deadline for applying for CFAP 1 was September 11, 2020.<sup>516</sup> There are narrow exceptions to this deadline—especially for farms affected by Hurricane Laura—that are discussed below.

#### 1. General Deadline: September 11, 2020

In general, the application period for CFAP 1 closed at the end of business on September 11, 2020.<sup>517</sup>

The deadline previously was August 28, 2020.<sup>518</sup> The deadline was extended on August 11, 2020. In general, an application submitted or postmarked after September 11, 2020, will not be approved for CFAP.<sup>519</sup>

#### 2. Narrow Exception for Hurricane Laura: October 9, 2020, Deadline

USDA extended the deadline for some farmers affected by Hurricane Laura in Louisiana and Texas.<sup>520</sup> The exception is only available for those areas that were affected by Hurricane Laura.

<sup>513</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,589 (prefatory remarks) (August 14, 2020);

<sup>514</sup> See FLAG, Farmers' Guide to Coronavirus Food Assistance Program (CFAP), Second Edition, pages 48 through 57 (June 17, 2020), at: <http://www.flaginc.org/wp-content/uploads/2020/10/Farmers-Guide-to-the-Coronavirus-Food-Assistance-Program-CFAP-2nd-Edition-June-17-2020-Archived.pdf>.

<sup>515</sup> CFAP Handbook, page 2-13, para. 21.B (September 15, 2020); FSA Notice CFAP-4, page 3, para. 2.A (May 20, 2020).

<sup>516</sup> CFAP Handbook, page 2-13, para. 21.B, page 3-3, para. 50.C (September 15, 2020); FSA Notice CFAP-9, CFAP Application Deadline, page 2 (September 9, 2020).

<sup>517</sup> Third CFAP Rule Correction, 85 Fed. Reg. 49,593, 49,594 (to be codified at 7.C.F.R. 9.4(a), 9.7(h)) (August 14, 2020); CFAP Handbook, page 2-13, para. 21.B, page 3-3, para. 50.C, page 3-8, para. 51.E (September 15, 2020); FSA Notice CFAP-9, CFAP Application Deadline, page 2 (September 9, 2020).

<sup>518</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(a)); FSA Notice CFAP-4, page 3, para. 2.A (May 20, 2020). Originally, the application period could have ended earlier if funds were exhausted before August 28, 2020. CFAP Rule, 85 Fed. Reg. 30,825, 30,835 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(h)).

<sup>519</sup> CFAP Handbook, page 2-13, para. 21.B, page 3-8, para. 51.E (September 15, 2020).

<sup>520</sup> FSA Notice CFAP-9, CFAP Application Deadline, page 2 (September 9, 2020); USDA, Coronavirus Food Assistance Program, Coronavirus Food Assistance Program Deadline Update (September 17, 2020). FSA's Notice CFAP-9 says that state FSA offices may extend the deadline up until October 9,

The extension applies to the following counties in Texas: Jasper, Jefferson, Newton, Orange, Sabine, and Tyler.<sup>521</sup> For Louisiana, USDA says only that the extension applies to those farmers affected by Hurricane Laura.

Farmers under this exception do not need to provide a written explanation of why they were unable to meet the September 11, 2020, deadline.<sup>522</sup>

### **3. Narrow Exception for Wildfires: October 9, 2020, Deadline**

USDA extended the deadline for some farmers affected by wildfires.<sup>523</sup> The extension applies to the following counties in Oregon: Benton, Clackamas, Clatsop, Columbia, Coos, Curry, Douglas, Jackson, Josephine, Klamath Falls, Lane, Lincoln, Linn, Marion, Multnomah, Polk, Tillamook, Washington, and Yamhill. The extension applies only to those areas affected by wildfires.

### **4. Narrow Exception: Written Explanation**

A narrow exception to the September 11, 2020, deadline can occur if the farmer submits an application after the deadline, and the farmer submits along with the application a written explanation of the reason for the late filing.<sup>524</sup> FSA will review the explanation. If the application, along with the written explanation, is filed by October 9, 2020, FSA will decide whether relief for the farmer is warranted. If the application and the written explanation is filed after October 9, 2020, but on or before November 6, 2020, FSA will also review the written explanation and decide if relief is warranted. In general, the explanation that the farmer did not know about the deadline is not a valid reason for finding the application should be allowed. Instead, the reasons for not meeting the deadline must be beyond the farmer's control. FSA, however, is under no obligation to accept a late-filed application. It appears that denial of this option is appealable by the farmer.

### **5. Narrow Exception: Sign a Register by September 11, 2020, but Complete Application Later**

An additional narrow exception applies to any farmer who contacted FSA prior to the September 11, 2020 deadline in order to apply for CFAP, but FSA could not accommodate the farmer's request.<sup>525</sup> If that occurred, the farmer should have been placed on a register and an appointment to complete the application should have been set, even if it was set for after the September 11, 2020 deadline. If the farmer used this option, the farmer still has only sixty days from the date of signing the application to

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2020 for those affected by Hurricane Laura. The USDA website declares that the deadline is extended until October 9, 2020 for eligible producers in Louisiana who were impacted by Hurricane Laura.

<sup>521</sup> USDA, Coronavirus Food Assistance Program, Coronavirus Food Assistance Program Deadline Update (September 17, 2020).

<sup>522</sup> FSA Notice CFAP-9, CFAP Application Deadline, page 2 (September 9, 2020).

<sup>523</sup> USDA, Coronavirus Food Assistance Program, Coronavirus Food Assistance Program Deadline Update (September 17, 2020).

<sup>524</sup> FSA Notice CFAP-9, CFAP Application Deadline, pages 2-3 (September 9, 2020).

<sup>525</sup> FSA Notice CFAP-9, CFAP Application Deadline, page 2 (September 9, 2020). More complete rules for this process are at FSA, Common Management and Operating Procedures, 1-CM (Revision 3), page 1-3 to 1-4.7 (para. 2)(January 2, 2020).



provide all eligibility documents to USDA. Not doing so can mean either a reduced payment or no payment at all. Technically, if the farmer is able follow this path, the application is not considered late by USDA.

## **B. CFAP Application—Form AD-3114**

Farmers may apply for CFAP for any commodity that is currently eligible under the program.<sup>526</sup> The Coronavirus Food Assistance (CFAP) Application is form AD-3114 and can be downloaded from USDA's website.<sup>527</sup> This form must be complete when submitted, and it must be signed.<sup>528</sup> If the application is completed but never signed it is not considered filed.

USDA changed the application form somewhat in the middle of the application process.<sup>529</sup> In general, USDA wants the revised application used after June 26, 2020. If, however, the original form, which is dated May 19, 2020, it can still be submitted by the farmer if that is the application the farmer has. It appears that USDA again revised the application form on August 14, 2020, after the addition of aquaculture and floriculture was made official in the Federal Register Rule published that same day.<sup>530</sup>

## **C. One Application—May be Revised Later by Farmer**

Farmers should submit only one application for their entire operation. The application can include all commodities that are then eligible. It may be revised later. The revision can add commodities that have been eligible. It also can be revised if additional commodities become eligible at a later date.<sup>531</sup>

## **D. Farmer Self-Certification Required**

The CFAP application largely involves farmer self-certification of information about the farming operation.<sup>532</sup> 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.<sup>533</sup> This

<sup>526</sup> See FSA Notice CFAP-5, Application Submission for Coronavirus Food Assistance Program (CFAP), page 2, para. 2.A (June 15, 2020). See also FSA Notice CFAP-9, CFAP Application Deadline, page 2, para. 2.A (September 9, 2020).

<sup>527</sup> The CFAP application, form AD-3114, is available at: <https://www.farmers.gov/cfap1/apply>. If a farmer needs more space to complete the application, the USDA website provides a link to a continuation form, called AD-3114A.

<sup>528</sup> CFAP Handbook, page 2-57, para. 37.A, page 3-3, para. 50.C, page 3-8, para. 51.E (September 15, 2020).

<sup>529</sup> See CFAP Handbook, page 3-7, para. 51.D (September 15, 2020).

<sup>530</sup> The most recent application, dated August 14, 2020, is available at: <https://www.farmers.gov/sites/default/files/documents/AD3114-CFAP-Application-08142020.pdf>.

<sup>531</sup> CFAP Handbook, page 3-1, para. 50.A. (September 15, 2020); FSA Notice CFAP-5, page 2, para. 2.A (June 15, 2020).

<sup>532</sup> See Coronavirus Food Assistance Program (CFAP) Application, Form AD-3114 (August 14, 2020), at: <https://www.farmers.gov/sites/default/files/documents/AD3114-CFAP-Application-08142020.pdf>.

<sup>533</sup> USDA, Coronavirus Food Assistance Program FAQ, "What documents do I need to submit with my application?" (September 29, 2020).

documentation will not need to be submitted with the application.<sup>534</sup> 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.<sup>535</sup>

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.<sup>536</sup> 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.<sup>537</sup>

This requirement is made somewhat confusing by the fact that the application form asks farmers to certify knowledge that appears to be inconsistent with current CFAP rules. Specifically, all farmers must certify that all eligible commodities were intended to be marketed for commercial production.<sup>538</sup> At present, however, USDA does not require that all commodities be intended for commercial production.<sup>539</sup> 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 farmer applications.<sup>540</sup> In the spot checks, USDA will ask for documentation that was used for the CFAP application.<sup>541</sup> USDA expects farmers to keep documents that were used for the application.<sup>542</sup> If the farmer provided inaccurate information on the CFAP application, the farmer may need to refund some of

<sup>534</sup> USDA, Apply for the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1/apply>; USDA, Coronavirus Food Assistance Program FAQ, “What documents do I need to submit with my application?” (September 29, 2020).

<sup>535</sup> CFAP Handbook, page 1-11, para. 3.G (September 15, 2020).

<sup>536</sup> USDA believes it is the farmer’s 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 (August 14, 2020), at: <https://www.farmers.gov/sites/default/files/documents/AD3114-CFAP-Application-08142020.pdf>. CFAP Handbook, page 1-11, para. 3.G, page 1-12, para. 4.B (September 15, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What documents do I need to submit with my application?” (September 29, 2020).

<sup>537</sup> CFAP Handbook, page 1-12, para. 4.A-B (September 15, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What documents do I need to submit with my application?” (September 29, 2020).

<sup>538</sup> Form AD-3114, Part A (August 14, 2020); CFAP Handbook, page 3-2, para. 50.B (August 14, 2020). The Handbook also states that farmers must certify that “all production/sales/inventory eligible for payment is subject to price risk.” CFAP Handbook, page 3-2, para. 50.B (August 14, 2020). However, the August 14, 2020 version of form AD-3114 no longer includes this certification on price risk.

<sup>539</sup> See First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799-35,800 (June 12, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.5(b)). 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).

<sup>540</sup> CFAP Handbook, page 3-5, para. 51.B (September 15, 2020).

<sup>541</sup> CFAP Handbook, page 3-5, para. 51.B (September 15, 2020); USDA, Coronavirus Food Assistance Program FAQ, “What documents do I need to submit with my application?” (September 29, 2020).

<sup>542</sup> For examples of supporting documentation that farmers may need, see CFAP Handbook, pages 3-5 and 3-6, para. 51.B (September 15, 2020).



the payment.<sup>543</sup> 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.

#### **E. 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.<sup>544</sup> Most FSA offices are currently available for phone appointments only, and farmers are advised to call their office to schedule an appointment.<sup>545</sup>

Prior to the September 11, 2020, deadline, CFAP applications could be submitted in-person (when available), by mail, email, or fax.<sup>546</sup> Other authorized methods may also have been allowed.<sup>547</sup> However, because the September 11, 2020, deadline has passed, USDA is requesting that farmers call their local FSA service center for assistance on existing or late applications.<sup>548</sup>

#### **F. 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.<sup>549</sup> USDA says that employees will be ready to assist farmers who call the CFAP Call Center.

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<sup>543</sup> 85 Fed. Reg. 30,825, 30,828 (May 21, 2020) (prefatory comments); CFAP Handbook, page 1-12, para. 4.A (September 15, 2020).

<sup>544</sup> 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/cfap1>; USDA, Coronavirus Food Assistance Program FAQ, “Do all producers need to apply through the Farm Service Agency?” (September 29, 2020). The regulations, however, state that CFAP applications may be submitted to “any FSA county office.” See CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(a)).

<sup>545</sup> For information on contacting and locating FSA Service Centers, see: <https://www.farmers.gov/coronavirus>.

<sup>546</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(a)); CFAP Handbook, page 3-1, para. 50.A (September 15, 2020); FSA Notice CFAP-4, page 4, para. 2.B (May 20, 2020).

<sup>547</sup> CFAP Handbook, page 3-1, para. 50.A (August 14, 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](http://www.farmers.gov).

<sup>548</sup> See USDA, Apply for the Coronavirus Food Assistance Program, Apply Today, at: <https://www.farmers.gov/cfap1/apply>.

<sup>549</sup> 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, Assistance with Applying, at: <https://www.farmers.gov/cfap1>; 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>.

## **G. 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.<sup>550</sup> 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.<sup>551</sup> Farmers working with FSA to apply for CFAP should receive receipts for service from USDA.

## **H. Application Generator and Payment Calculator**

The USDA website also provides what it is calling a CFAP Application Generator and Payment Calculator.<sup>552</sup> 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. USDA has said that after the September 11, 2020, deadline it will no longer be accepting online applications, so farmers will still need to contact their local FSA service center to apply, even if they use the application generator.

## **I. 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.<sup>553</sup> That information is self-certified by the farmer.

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

USDA says it will look to see if the information on the CFAP application is reasonable and accurate.<sup>554</sup> The review will be based on the application itself.<sup>555</sup>

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 the end of the sign-up period,

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<sup>550</sup> 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>. And see, as well, FSA, Common Management and Operating Procedures, 1-CM (Revision 3), page 1-5, para. 4 (January 2, 2020).

<sup>551</sup> 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](https://www.fsa.usda.gov/Internet/FSA_Notice/ao_1751.pdf).

<sup>552</sup> See USDA, Apply for the Coronavirus Food Assistance Program, Apply Today, at: <https://www.farmers.gov/cfap1/apply>.

<sup>553</sup> CFAP Handbook, page 2-56, para. 36.B, page 3-5, para. 51.B (September 15, 2020).

<sup>554</sup> CFAP Handbook, page 3-7, para. 51.D (September 15, 2020).

<sup>555</sup> CFAP Handbook, page 3-7, para. 51.C (September 15, 2020).

September 11, 2020.<sup>556</sup> 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.<sup>557</sup>

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.”<sup>558</sup> 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.<sup>559</sup>

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

### **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.<sup>560</sup>

#### ***b. Make “Adjustments”***

USDA may make “adjustments” to the information that is reported on the application based on information that the farmer gives USDA.<sup>561</sup> 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.<sup>562</sup> USDA can deny the application if it decides the information on

<sup>556</sup> CFAP Handbook, pages 3-7 and 3-8, para. 51.C-E (September 15, 2020).

<sup>557</sup> CFAP Handbook, pages 3-5 and 3-6, para. 51.B, page 3-8, para. 51.E (September 15, 2020).

<sup>558</sup> CFAP Application, Form AD-3114, Part A; CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)); CFAP Handbook, page 3-2, para. 50.B (September 15, 2020).

<sup>559</sup> CFAP Handbook, page 2-56, para. 36.B, page 3-5, para. 51.B (September 15, 2020).

<sup>560</sup> CFAP Handbook, page 3-7, para. 51.C-D (September 15, 2020).

<sup>561</sup> CFAP Handbook, page 1-11, para. 3.G, page 3-8, para. 51.E (September 15, 2020).

<sup>562</sup> CFAP Handbook, page 1-11, para. 3.G, page 3-8, para. 51.E (September 15, 2020).

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.<sup>563</sup> 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.<sup>564</sup>

Second, USDA must notify the farmer that the farmer may appeal the decision.<sup>565</sup> Appeals are discussed below.

Third, USDA must document the reason for the adjustment or denial in the minutes for the USDA county committee.<sup>566</sup> This information can become important if the farmer appeals the USDA 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 be eligible for CFAP.<sup>567</sup> USDA calls these required forms eligibility forms.

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<sup>563</sup> CFAP Handbook, page 3-8, para. 51.E (September 15, 2020). The signature must be on Form AD-3114, in part I. Signature rules 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 2, 2020).

<sup>564</sup> CFAP Handbook, page 3-8, para. 51.E (September 15, 2020).

<sup>565</sup> CFAP Handbook, page 3-8, para. 51.E (September 15, 2020).

<sup>566</sup> CFAP Handbook, page 3-8, para. 51.E (September 15, 2020).

<sup>567</sup> CFAP Handbook, page 2-57, para. 37.A (September 15, 2020); CFAP Rule, 85 Fed. Reg. 30,825, 30,831-30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)). At one point, USDA says that if all eligibility 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, page 3-7, para. 51.D (September 15, 2020). At another point, USDA says that all required eligibility forms must be filed before a CFAP payment will be issued. CFAP Handbook, page 2-57, para. 37.A (September 15, 2020).

Each of these forms must be submitted within sixty days from the date on which the farmer signs the CFAP application.<sup>568</sup> If they are not submitted within this timeframe, the farmer may receive a reduced payment or no payment at all.<sup>569</sup>

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

### **1. CFAP Application (Form AD-3114)**

As described in more detail above, to be eligible for CFAP the farmer must submit a completed and signed application, Form AD-3114.<sup>570</sup>

### **2. Farm Operating Plan (Form CCC-902)**

A farm operating plan must be submitted.<sup>571</sup> This is known as Form CCC-902. It must be submitted within sixty days of signing the CFAP application.<sup>572</sup>

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.<sup>573</sup> 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.

<sup>568</sup> The current Handbook says that eligibility forms (AD-1026, CCC-902, CCC-941, etc.) must be filed within sixty days of the farmer signing the AD-3314 application. CFAP Handbook, page 2-11, para. 20.A, page 3-2, para. 50.B (September 15, 2020). See, as well, CFAP Rule, 85 Fed. Reg. 30,825, 30,827, 30,831 (May 21, 2020) (prefatory comments and to be codified at 7 C.F.R. § 9.4(b)); FSA Notice CFAP-4, page 8, para. 3.G (May 20, 2020).

<sup>569</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (prefatory comments), 30,831 (to be codified at 7 C.F.R. § 9.4(b)); CFAP Handbook, page 2-11, para. 20.A, page 3-7, para. 51.D (September 15, 2020); FSA Notice CFAP-4, page 8, para. 3.F-G (May 20, 2020).

<sup>570</sup> CFAP Handbook, page 2-57, para. 37.A, page 3-3, para. 50.C, page 3-8, para. 51.E (September 15, 2020).

<sup>571</sup> CFAP Application, Form AD-3114, Part A; CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(1)); CFAP Handbook, page 2-10, para. 19.A, page 2-57, para. 37.A (September 15, 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 FSA Handbook, 5-PL (Amendment 6), Payment Eligibility, Payment Limitation, and Average Adjusted Gross Income—Agricultural Act of 2014 (October 2, 2019).

<sup>572</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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 (September 15, 2020). 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).

<sup>573</sup> CFAP Application, Form AD-3114, Part A; CFAP Handbook, page 2-10, para. 19.A (September 15, 2020); FSA Notice CFAP-4, page 8, para. 3.F (August 14, 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.

The USDA website says that USDA staff will help applicants complete the required parts of Form CCC-902.<sup>574</sup>

### **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.<sup>575</sup> 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.<sup>576</sup> 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).<sup>577</sup> There are two potential forms that may be required to meet this requirement.<sup>578</sup> First, a farmer should submit an Average Adjusted Gross Income Certification, form CCC-941, which provides a certification of AGI and a consent to tax disclosure.<sup>579</sup> 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.<sup>580</sup> This is known as Form CCC-942.<sup>581</sup>

<sup>574</sup> See USDA, Coronavirus Food Assistance Program, Apply for the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1/apply>.

<sup>575</sup> Form CCC-901 is available in English and Spanish, at: <https://www.farmers.gov/cfap1/apply>. For this requirement, see CFAP Application, Form AD-3114, Part A; CFAP Handbook, Exhibit 20, pages 5-6 (September 15, 2020); CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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).

<sup>576</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(2)).

<sup>577</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(3)-(4)); CFAP Handbook, page 2-57, para. 37.A (September 15, 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).

<sup>578</sup> USDA, Coronavirus Food Assistance Program FAQ, "Who must fill out forms CCC-941 and CCC-942 to certify average AGI and Farm AGI?" (September 29, 2020), at: <https://www.farmers.gov/cfap1/faq>.

<sup>579</sup> Form CCC-941 is available in English and Spanish, at: <https://www.farmers.gov/cfap1/apply>. For this requirement, see CFAP Application, Form AD-3114, Part A; CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (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 (September 15, 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).

<sup>580</sup> For this requirement, see CFAP Application, Form AD-3114, Part A; CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(4)); CFAP Handbook, page 2-57, para. 37.A (September 15, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020).

<sup>581</sup> A downloadable copy of form CCC-942, with instructions, is available at: <https://www.farmers.gov/cfap1/apply>.

Both form CCC-941 and form CCC-942, if applicable, must be submitted within sixty days of signing the CFAP application.<sup>582</sup> 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.<sup>583</sup> This is true for CFAP, although the rules that apply are a bit unusual.<sup>584</sup> When applying for CFAP, the application requires that farmers agree to comply with certain conservation compliance rules.<sup>585</sup>

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.<sup>586</sup> That often also means providing documentation about the farmland.<sup>587</sup>

For some farmers, only a part of the Form AD-1026 needs to be completed. These rules apply for CFAP.<sup>588</sup> 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.<sup>589</sup> 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.<sup>590</sup> FSA calls this

<sup>582</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(3)-(4)).

<sup>583</sup> USDA, Coronavirus Food Assistance Program FAQ, "Do the Farm Bill's conservation compliance requirements apply to CFAP?" (September 29, 2020), at: <https://www.farmers.gov/cfap1/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).

<sup>584</sup> CFAP Application, Form AD-3114, Part A; CFAP Handbook, page 2-8, para. 18.A (September 15, 2020).

<sup>585</sup> CFAP Handbook, pages 2-8 and 2-9, para. 18.A (September 15, 2020). On the CFAP application, the conservation compliance sections are found at Form AD-3114, Part A, numbers 7, 7A, 7B, and 8.

<sup>586</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)); CFAP Handbook, page 2-57, para. 37.A (September 15, 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/cfap1/apply>.

<sup>587</sup> Highly Erodible Land Handbook, 6-CP, page 6-122, para. 641.D (June 21, 2019).

<sup>588</sup> See CFAP Application, Form AD-3114, Part A; CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)); CFAP Handbook, page 2-8, para. 18.A (September 15, 2020).

<sup>589</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)).

<sup>590</sup> 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 (September 15, 2020); Form AD-1026, Part D.



continuous certification. Even with continuous certification, farmers must complete a new Form AD-1026 if certain changes are made to the farming operation.<sup>591</sup>

Most rules for continuous certification are applicable to farmers applying for CFAP.<sup>592</sup> 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.<sup>593</sup> 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.<sup>594</sup> 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.<sup>595</sup> This means the farmer does not own and does not rent agricultural land, including cropland, rangeland, pasture, and forestland. Further, it means the farmer does not raise a commodity by sharing in a crop.<sup>596</sup>

In general, for this exception to apply, the farmer must be a producer of livestock, nursery crops, aquaculture crops, honey, or other commodities that are not produced from the tillage of land.<sup>597</sup> Under this exception, USDA has in mind farmers that keep bees on someone else's land but do not rent the land.<sup>598</sup> 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.

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<sup>591</sup> See Highly Erodible Land Handbook, 6-CP, page 3-8.6, para. 303.E (June 21, 2019); Form AD-1026, Part D.

<sup>592</sup> CFAP Handbook, page 2-8, para. 18.A (September 15, 2020).

<sup>593</sup> CFAP Handbook, page 2-8, para. 18.A (September 15, 2020). The farmer would only need to complete Part A and Part D of Form AD-1026, and check box 5B.

<sup>594</sup> Highly Erodible Land Handbook, 6-CP, page 6-122, para. 641.D (June 21, 2019).

<sup>595</sup> CFAP Application, AD-3114, Part A. On Form AD-1026 that means the farmer checks box 5A.

<sup>596</sup> Form AD-1026, Part A, Item 5A.

<sup>597</sup> Form AD-3114, Part A, Item 7B; see also CFAP Handbook, page 2-9, para. 18.A (September 15, 2020).

<sup>598</sup> Form AD-1026, Part A, Item 5A.



If a farmer meets this exception, the farmer must only fill out a portion of Form AD-1026 in order to participate in CFAP.<sup>599</sup>

**(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.<sup>600</sup>

First, the farmer must be able to certify that the only USDA programs subject to conservation compliance that the farmer participates in are CFAP or federal crop insurance.<sup>601</sup>

Second, the farmer must be able to certify that the farmer only has interest in land that produces perennials.<sup>602</sup> 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.<sup>603</sup> 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.<sup>604</sup> Perennial crops, for this purpose, do not include sugar cane.<sup>605</sup>

Third, the farmer must be able to certify that the farmer has not converted a wetland after December 23, 1985.<sup>606</sup>

If a farmer meets this exception, the farmer must only fill out a portion of Form AD-1026 in order to participate in CFAP.<sup>607</sup>

<sup>599</sup> 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 (September 15, 2020); CFAP Application, AD-3114, Part A. Items 7B, 8.

<sup>600</sup> CFAP Handbook, page 2-8, para. 18.A (September 15, 2020). Farmers that meet this requirement would check Box 5B on Form AD-1026.

<sup>601</sup> Form AD-1026, section 5; CFAP Handbook, page 2-8, para. 18.A (September 15, 2020).

<sup>602</sup> CFAP Handbook, page 2-8, para. 18.A (August 14, 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](http://www.nrcs.usda.gov/compliance).

<sup>603</sup> Form AD-1026, Appendix, no. 3.

<sup>604</sup> CFAP Handbook, page 2-8, para. 18.A (September 15, 2020); Form AD-1026, Part A, Section 5.

<sup>605</sup> CFAP Handbook, page 2-8, para. 18.A (September 15, 2020).

<sup>606</sup> CFAP Handbook, page 2-8, para. 18.A (September 15, 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.

<sup>607</sup> 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 (September 15, 2020); CFAP Application, AD-3114, Part A. Items 7A, 8.

#### ***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.<sup>608</sup>

Usually, filling out a complete Form AD-1026 would require additional documents and would mean establishing farm records.<sup>609</sup> Establishing a farm record means the farmer must receive a farm number from USDA.<sup>610</sup>

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.<sup>611</sup> 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.<sup>612</sup> This can occur if USDA thinks that the application is not reasonable or is questionable.<sup>613</sup>

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

#### **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.<sup>614</sup>

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.<sup>615</sup>

<sup>608</sup> CFAP Handbook, page 2-9, para. 18.A (September 15, 2020). When filling out form AD-1026, farmers must follow the rules in the Highly Erodible Land Handbook, 6-CP (June 21, 2019).

<sup>609</sup> Highly Erodible Land Handbook, 6-CP, page 6-122, para. 641.D (June 21, 2019).

<sup>610</sup> 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).

<sup>611</sup> CFAP Handbook, page 2-9, para. 18.A (September 15, 2020).

<sup>612</sup> CFAP Application, Form AD-3114, Part A; CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (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 (September 15, 2020).

<sup>613</sup> CFAP Handbook, page 3-8, para. 51.E (September 15, 2020).

<sup>614</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(1)).

<sup>615</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(2)).

### 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.<sup>616</sup>

### 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.<sup>617</sup> For example, the production for various commodities, including non-specialty crops, dairy, eggs, 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 USDSA decides are acceptable.<sup>618</sup>

#### b. Eggs

For eggs, the following are examples of production evidence that can provide supporting documentation: (1) egg marketing statements from January, February, and March 2020; (2) contracts; (3) sales receipts; and (4) other records that USDSA decides are acceptable.<sup>619</sup>

#### c. Non-Specialty, Specialty, Value-Loss Crops, and Wool

For specialty crops, non-specialty crops, value-loss crops,<sup>620</sup> 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 production costs; and (8) truck sale tickets.<sup>621</sup> USDA will also accept contemporaneous diaries that USDA decides are acceptable, as well as

<sup>616</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(c)(3)).

<sup>617</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (prefatory comments) (May 21, 2020); CFAP Handbook, pages 3-5 and 3-6, para. 51.B (September 15, 2020).

<sup>618</sup> CFAP Handbook, page 3-5, para. 51.B (September 15, 2020).

<sup>619</sup> CFAP Handbook, page 3-5, para. 51.B (September 15, 2020).

<sup>620</sup> This reference to value loss crops may mean aquaculture and nursery crops. In previous versions of the CFAP Handbook, USDA referred to aquaculture and nursery crops as being value loss crops. See, for example, CFAP Handbook, page 2-12, para. 21.A, page 7-1, para. 200.A (May 22, 2020). However, once USDA decided to officially add aquaculture and nursery crops to the list of eligible CFAP commodities, the Handbook was revised, and those crops are no longer categorized as value loss crops. See CFAP Handbook, page 2-12, para. 21.A, page 7-1, para. 200.A (September 15, 2020).

<sup>621</sup> CFAP Handbook, page 3-5, para. 51.B (September 15, 2020).

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.<sup>622</sup>

According to the CFAP Handbook, local FSA offices will not review any documentation provided for specialty crops if there are concerns or questions about the reasonableness of that documentation.<sup>623</sup> Instead, the additional documentation submitted by the farmer will be provided to USDA's Agricultural Marketing Service (AMS) for review.

#### ***d. Livestock***

For livestock, USDA gives examples of sources of production evidence that would be acceptable.<sup>624</sup> 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.<sup>625</sup>

### **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.<sup>626</sup>

#### **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.<sup>627</sup> 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.<sup>628</sup>

<sup>622</sup> CFAP Handbook, page 3-5, para. 51.B (September 15, 2020).

<sup>623</sup> CFAP Handbook, page 3-6, para. 51.B (September 15, 2020).

<sup>624</sup> CFAP Handbook, page 3-6, para. 36.B (September 15, 2020).

<sup>625</sup> CFAP Handbook, page 3-6, para. 51.B (September 15, 2020).

<sup>626</sup> Form AD-2047 is available at: <https://www.farmers.gov/cfap1/apply>.

<sup>627</sup> CFAP Handbook, page 2-10, para. 19.A (September 15, 2020); FSA Notice CFAP-4, page 8, para. 3.F (May 20, 2020).

<sup>628</sup> Form SF-3881 is available at: <https://www.farmers.gov/cfap1/apply>.

#### **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.<sup>629</sup> This certification is completely optional, but local FSA offices should provide the form to those applying for CFAP.<sup>630</sup> 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.<sup>631</sup>

#### **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.<sup>632</sup> This includes documentation of production, sales, inventory, and acreage.<sup>633</sup>

#### **F. Farm Numbers**

USDA says that in order to apply for CFAP, a "USDA farm number may not be immediately needed."<sup>634</sup> 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.<sup>635</sup>

### **VIII. CFAP Payments**

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

#### **A. Initially Made in Two Disbursements—Now One Payment**

<sup>629</sup> Form CCC-860 is available at:

[https://forms.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/CCCo860\\_140402V01.pdf](https://forms.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/CCCo860_140402V01.pdf).

<sup>630</sup> FSA Notice CFAP-4, page 18, para. 6.B (May 20, 2020).

<sup>631</sup> CFAP Handbook, page 3-5, para. 51.B (September 15, 2020).

<sup>632</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.6(a)); CFAP Handbook, page 1-11, para. 3.G (September 15, 2020).

<sup>633</sup> CFAP Handbook, page 2-56, para. 36.B (September 15, 2020).

<sup>634</sup> USDA, Apply for the Coronavirus Food Assistance Program, Additional Application Materials, at: <https://www.farmers.gov/cfap1/apply>.

<sup>635</sup> 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](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](https://www.fsa.usda.gov/Internet/FSA_File/10-cm_roo_a05.pdf).

During the first months of CFAP, payments were made in two disbursements.<sup>636</sup> An initial payment would account for 80 percent of the farmer's maximum eligible CFAP payment.<sup>637</sup> If funds remained available, FSA issued a second payment—up to the total amount of the farmer's remaining eligible payment.<sup>638</sup>

According to USDA, beginning with the week of August 17, 2020, CFAP payments were no longer to be paid out in two disbursements.<sup>639</sup> Instead, USDA would issue one payment amounting to 100 percent of the farmer's approved CFAP payment. USDA says that for farmers who previously received an 80 percent payment, it would automatically issue the remaining 20 percent payment.

## **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.<sup>640</sup> 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.<sup>641</sup> 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.<sup>642</sup>

## **C. Payment Rates Set By USDA**

CFAP payments are calculated, in part, using payment rates that USDA has set for each eligible commodity.<sup>643</sup> The payment rates often differ depending on whether the funding is coming from the CARES Act or the CCC. A description of how USDA determines these payment rates is described immediately below.

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<sup>636</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(k)); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

<sup>637</sup> 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).

<sup>638</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(k)); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

<sup>639</sup> USDA, Coronavirus Food Assistance Program FAQ, "The impacts of COVID-19 on agriculture producers are significant. What if you run out of funding?" (September 29, 2020), at: <https://www.farmers.gov/cfap1/faq>; USDA, Coronavirus Food Assistance Program, What is the Payment Structure?, at: <https://www.farmers.gov/cfap1>.

<sup>640</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments).

<sup>641</sup> For a chart that outlines the differences in which types of losses are paid for with CARES Act money versus CCC money, see CFAP Handbook, pages 2-15 and 2-16, para. 22.A (September 15, 2020).

<sup>642</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826, 30,827 (May 21, 2020) (prefatory comments).

<sup>643</sup> See CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833, 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 2-23, para. 22.B (September 15, 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/cfap1/specialty>.



The most up-to-date list of eligible commodities and their payment rates can be found in the September 15, 2020, CFAP Handbook as well as on the USDA website.<sup>644</sup> In CFAP rules dated July 10, 2020, and August 14, 2020, FSA changed the payment rates for many crops.<sup>645</sup> For a number of crops the payment rate went up.<sup>646</sup> For several others, the payment rate went down.<sup>647</sup> USDA says these payment rate changes will not impact farmers who have applied for CFAP for commodities that now have a decreased payment rate.<sup>648</sup> For farmers who have applied for CFAP for commodities that now have an increased payment rate—with the exception of mint and potato farmers—USDA says it will automatically calculate and issue the increased payment. USDA says farmers of mint and potatoes must contact their local FSA offices in order to identify the specific type of mint and potatoes they grow.

## 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.<sup>649</sup> There is one payment rate per crop, and it applies nationwide.<sup>650</sup>

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.<sup>651</sup>

## 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 or Unpaid; and (3) Not Delivered.<sup>652</sup> These categories are described in more detail below.

<sup>644</sup> CFAP Handbook, pages 2-17 through 2-23, para. 22.B (September 15, 2020); USDA, Coronavirus Food Assistance Program, Commodity Eligibility for the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1>.

<sup>645</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,322 (July 10, 2020); NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020).

<sup>646</sup> These include apples, tangerines, brussels sprouts, and cantaloupes. See NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,322 (July 10, 2020).

<sup>647</sup> These include asparagus, mushrooms, papaya, rhubarb. See NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 41,321, 41,322 (July 10, 2020).

<sup>648</sup> USDA, Coronavirus Food Assistance Program FAQ, “The payment rate for my commodity changed from when I applied. Do I have to do anything?” (September 29, 2020), at: <https://www.farmers.gov/cfap1/faq>.

<sup>649</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 2-17, para. 22.B, page 5-1, para. 125.B (September 15, 2020).

<sup>650</sup> CFAP Handbook, page 5-51, para. 151.A (September 15, 2020). For the USDA payment rates for eligible non-specialty crops, see CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(h)).

<sup>651</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 5-1, para. 125.B (September 15, 2020). If futures prices were not available for the crop, USDA used cash prices.

<sup>652</sup> CFAP Handbook, page 8-1, para. 211.A, page 8-45, para 235.A (September 15, 2020).

USDA has set one payment rate for each category of eligible specialty crop, and that rate applies nationwide.<sup>653</sup> For example, almonds—an eligible specialty crop—have a different payment rate depending on whether the almonds fall into the category of Sales, Delivered or Unpaid, or Not Delivered<sup>654</sup>

#### **a. Sales**

Specialty crops that fall within the Sales category are those that were sold between January 15, 2020, and April 15, 2020, and suffered a five percent or more price loss as a result of the COVID-19 crisis.<sup>655</sup> These payments come from CARES Act funds.<sup>656</sup>

Specialty crops that were under an agreed upon set price before January 15, and which were or will be paid that amount or higher, do not qualify under the Sales category.<sup>657</sup>

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.<sup>658</sup>

#### **b. Delivered or Unpaid**

Specialty crops that fall within the Delivered or Unpaid category are crops that were harvested and shipped by April 15, 2020, but later spoiled or did not result in a payment due to a loss of marketing channels.<sup>659</sup>

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.<sup>660</sup> These payments come from CARES Act funds.<sup>661</sup>

<sup>653</sup> For the USDA payment rates, see CFAP Handbook, page 2-19 to 2-23, para. 22.B, pages 8-45 through 8-47, para. 235.A (September 15, 2020). See also USDA, Specialty Crops and the Coronavirus Food Assistance Program, CFAP Payments for Specialty Crops (September 17, 2020), at:

<https://www.farmers.gov/cfap1/specialty>.

<sup>654</sup> See CFAP Handbook, page 8-45, para. 235.A (September 15, 2020).

<sup>655</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b), (h)); CFAP Handbook, page 8-1, para. 211.A (September 15, 2020); USDA, Specialty Crops and the Coronavirus Food Assistance Program, CFAP Payments for Specialty Crops (September 17, 2020), at: <https://www.farmers.gov/cfap1/specialty>.

<sup>656</sup> CFAP Handbook, page 8-1, para. 211.A (September 15, 2020).

<sup>657</sup> CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)); CFAP Handbook, page 8-24, para. 222.C (September 15, 2020).

<sup>658</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments). See also USDA, Coronavirus Food Assistance Program Cost-Benefit Analysis, 2, 10-11 (May 14, 2020), at: <https://www.farmers.gov/sites/default/files/documents/CFAP%20CBA%205%2015%202020.pdf>.

<sup>659</sup> CFAP Handbook, page 8-1, para. 211.A-B (September 15, 2020).

<sup>660</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments). See also USDA, Coronavirus Food Assistance Program Cost-Benefit Analysis, 2, 10-11 (May 14, 2020), at: <https://www.farmers.gov/sites/default/files/documents/CFAP%20CBA%205%2015%202020.pdf>.

<sup>661</sup> CFAP Handbook, page 8-1, para. 211.A (September 15, 2020).



### **c. Not Delivered**

Specialty crops that fall within the Not Delivered category include crops that did not leave the farm, and mature crops that remained unharvested between January 15, 2020, and April 15, 2020, due to a loss of marketing channels.<sup>662</sup> In a change to the CFAP rules on June 12, 2020, USDA clarified that this category also includes crops that were donated.<sup>663</sup>

To fall within the category of Not Delivered, the specialty crops cannot be sold.<sup>664</sup> In addition, crops in inventory or in storage facilities that can be sold after April 15, 2020, are not eligible.

Payments for this category of crops are determined based on the number of acres left in the field, donated directly from the farm, or harvested but not shipped, and the payments are made using CCC funds.<sup>665</sup> The payment rates for specialty crops in the Not Delivered category are based on the national crop yield multiplied by a per pound payment rate, that USDA says should represent 5.875 percent of the crop's value.<sup>666</sup>

## **3. Livestock Payment Rates**

USDA says it determined payment rates for eligible livestock—meaning cattle, hogs, pigs, and sheep—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.<sup>667</sup> The payments rates are set on a per-head basis to reflect the price declines.

<sup>662</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3)); CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b), (h)); CFAP Handbook, page 8-1, para. 211.A-B (August 14, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, “If producers donated their specialty crop, are they eligible for Category 2 or Category 3 payments?” (September 29, 2020), at: <https://www.farmers.gov/cfap1/faq>.

<sup>663</sup> CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,777 (June 12, 2020) (prefatory comments); CFAP Handbook, page 8-48, para. 235.B (September 15, 2020).

<sup>664</sup> CFAP Handbook, page 8-1, para. 211.B (September 15, 2020).

<sup>665</sup> CFAP Handbook, page 8-1, para. 211.A, page 8-23, para. 222.A, pages 8-45 and 8-46, para. 235.A (September 15, 2020).

<sup>666</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 8-48, para. 235.B (September 15, 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 through 8-47, para. 235.A (September 15, 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 tables in the CFAP rules indicate that specialty crops that were not delivered are paid per pound, not per acre. See, for example, NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592-49,593 (August 14, 2020); CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,777 (June 12, 2020) (prefatory comments).

<sup>667</sup> CFAP Handbook, page 6-1, para. 165.B (September 15, 2020).

#### 4. Dairy Payment Rates

For dairy—meaning milk from bovines—USDA has determined two different payments rates.<sup>668</sup> The first rate was determined by taking 80 percent of the national price decline in milk for the first quarter of 2020. This amounts to \$0.0471 per pound for the three-month milk production.<sup>669</sup> Dairy payments using this rate are funded through the CARES Act. The second payment rate was determined by taking 25 percent of the national price decline in milk for the first quarter of 2020. This amount—after being adjusted to reflect increased production for quarter two of 2020—is \$0.0147 per pound for the three-month dairy production. Dairy payments using this rate are funded through the CCC. As described in more detail below, both of these payment rates are used to calculate a farmer's CFAP payment for dairy.

#### 5. Egg Payment Rates

For eggs, payment rates use frozen or liquid egg production for the first quarter of 2020.<sup>670</sup> For liquid eggs, the payment rate is either \$0.05 per pound (using CARES Act funding), or \$0.02 per pound (using CCC funds).<sup>671</sup> For frozen eggs, the payment rate is either \$0.06 per pound (using CARES Act funding), or \$0.02 per pound (using CCC funds).

#### 6. Wool Payment Rates

USDA has calculated two different payment rates, per pound, for wool.<sup>672</sup> 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.<sup>673</sup> 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.<sup>674</sup> CARES Act funds are used for this portion of a wool payment. The second payment rate was determined by taking 55 percent of the price decline between those two weeks, and CCC funds are used for this portion of a wool payment. As described in more detail below, both of these payment rates are used to calculate a farmer's CFAP payment for wool.

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<sup>668</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826-30,827 (May 21, 2020) (prefatory comments); CFAP Handbook, page 4-1, para. 85.B (September 15, 2020). For the USDA payment rates for dairy, see CFAP Handbook, pages 4-71 and 4-72, para. 111.A-B (September 15, 2020).

<sup>669</sup> CFAP Handbook, pages 4-71 and 4-72, para. 111.A-B (September 15, 2020).

<sup>670</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 4-1, para. 85.B, page 4-71 to 4-72, para. 111.A-B (September 15, 2020).

<sup>671</sup> CFAP Handbook, page 4-71, para. 111.A (September 15, 2020).

<sup>672</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826-30,827 (May 21, 2020) (prefatory comments); CFAP Handbook, page 2-17, para. 22.B, page 5-1, para. 125.B (September 15, 2020).

<sup>673</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826-30,827 (May 21, 2020) (prefatory comments).

<sup>674</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826-30,827 (May 21, 2020) (prefatory comments). For the current payment rates for wool, see CFAP Handbook, page 5-51, para. 151.A (September 15, 2020).

## 7. Aquaculture Payment Rates

Aquaculture payment rates are based on the different species identified as eligible, and the type of loss suffered.<sup>675</sup> In general, the rates are determined on a per pound basis, but for tropicals and ornamentals the rates are determined on a per piece basis.<sup>676</sup>

Payment rates for aquaculture inventory of crayfish, largemouth bass, carp, or salmon that was sold between January 15, 2020 and April 15, 2020, are based on the price decline from that period.<sup>677</sup> CARES Act funds are used to fund this portion of any aquaculture losses.

CCC money is used to fund the portion of aquaculture losses that come from all eligible inventory of market-ready fish that was not sold between January 15, 2020, and April 15, 2020.<sup>678</sup> USDA, however, has not explained how it determined the payment rates for these losses.

Similarly, USDA has not explained how it determined the payment rate for crayfish that were not sold as of April 15, 2020, and which will not be sold in 2020 due to a lack of market.<sup>679</sup> CCC money is used to fund these crayfish losses.

## 8. Nursery and Floriculture Payment Rates

Nursery and floriculture payment rates differ depending on whether—during the period between January 15, 2020, and April 15, 2020—the inventory was shipped but later spoiled or went unpaid, or whether the inventory was never sold.<sup>680</sup>

For inventory that was shipped and later spoiled or went unpaid, the rate is 15.55 percent, and CARES Act funds are used for this portion of the payment.<sup>681</sup> CCC funds are used to pay for the portion of any inventory that was never sold, and the payment rate is 13.45 percent.

Payment rates for nursery and floriculture were determined using coverage rates that equal half of input costs multiplied by the 40.5 percent of the average reported revenue loss for each commodity.<sup>682</sup> According to USDA, this method accounts for the fact that nursery and floriculture have a higher percentage of input costs prior to “harvest” when compared to traditional agricultural crops.

<sup>675</sup> CFAP Handbook, page 2-18, para. 22.B, page 7.5-10, para. 207.G (September 15, 2020).

<sup>676</sup> For aquaculture payment rates, see NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593, Table 3 (August 14, 2020); CFAP Handbook, pages 7.5-8 through 7.5-10, para. 207.C-E (September 15, 2020).

<sup>677</sup> CFAP Handbook, page 7.5-8, para. 207.C (September 15, 2020).

<sup>678</sup> CFAP Handbook, page 7.5-9, para. 207.D (September 15, 2020).

<sup>679</sup> CFAP Handbook, page 7.5-10, para. 207.E (September 15, 2020).

<sup>680</sup> CFAP Handbook, page 2-18, para. 22.B, page 7.5-15, para. 208.G (September 15, 2020).

<sup>681</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020) (prefatory comments); CFAP Handbook, page 2-18, para. 22.B, page 7.5-15, para. 208.G (September 15, 2020).

<sup>682</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020) (prefatory comments).

## D. Payment Calculations

CFAP payments are calculated by USDA for each eligible commodity.<sup>683</sup> 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, and sheep; (4) eggs; (5) dairy; (6) wool; (7) aquaculture; and (8) nursery and floriculture.

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.<sup>684</sup> 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 unsold inventory that was harvested and held as of January 15, 2020, not to exceed the farmer's total 2019 production.<sup>685</sup> Sometimes USDA refers to this as unpriced inventory, or inventory that is subject to price risk.<sup>686</sup> 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.<sup>687</sup>

#### 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.<sup>688</sup>

**Step One:** Determine the farmer's eligible unsold (or 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.<sup>689</sup>

<sup>683</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5); CFAP Handbook, pages 2-15 and 2-16, para. 22.A (September 15, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Coronavirus Food Assistance Program FAQ, "How are payments determined?" (September 29, 2020), at: <https://www.farmers.gov/cfap1/faq>.

<sup>684</sup> The CFAP Application Generator and Payment Calculator can be downloaded from the Coronavirus Food Assistance Program website, at: <https://www.farmers.gov/cfap1>.

<sup>685</sup> CFAP Handbook, page 2-15, para. 22.A (September 15, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020); USDA, Non-Specialty Crops and the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1/non-specialty>.

<sup>686</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,831 (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, page 5-23, para. 138.C, page 5-31, para. 141.A (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (August 10, 2020).

<sup>687</sup> For examples of forward contracts, see CFAP Handbook, page 5-31, para. 141.B, pages 5-33 through 5-36, para. 141.D (September 15, 2020).

<sup>688</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826, 30,832 (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 (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (August 10, 2020).

<sup>689</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)(1), (h)); CFAP Handbook, pages 5-52 and 5-53, para. 152.A-B (September 15, 2020); FSA Fact Sheet,

**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.<sup>690</sup>

### ***b. CCC Funding Formula***

The following steps are taken to determine the part of non-specialty crop payments that come from CCC funding.<sup>691</sup>

**Step One:** Determine the farmer's eligible unsold (or 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.<sup>692</sup>

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

**Step Three:** Multiply the result of Step Two by the applicable payment rate in order to determine the portion of the CFAP payment that comes from CCC funding.<sup>693</sup>

### ***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.<sup>694</sup>

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Coronavirus Food Assistance Program for Non-Specialty Crop Producers (August 10, 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 (September 15, 2020).

<sup>690</sup> For a commodity's applicable payment rate, see CFAP Handbook, page 5-51, para. 151.A (September 15, 2020); USDA, Non-Specialty Crops and the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1/non-specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (August 10, 2020).

<sup>691</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)(2), (h)); CFAP Handbook, page 2-15, para. 22.A (September 15, 2020).

<sup>692</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)(1), (h)); CFAP Handbook, pages 5-52 and 5-53, para. 152.A-B (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (August 10, 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 (September 15, 2020).

<sup>693</sup> For a commodity's applicable payment rate, see CFAP Handbook, page 5-51, para. 151.A (September 15, 2020); USDA, Non-Specialty Crops and the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1/non-specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Non-Specialty Crop Producers (August 10, 2020).

<sup>694</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(a)); CFAP Handbook, page 5-1, para. 125.B (September 15, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

## 2. Calculating Specialty Crop Payments

Specialty crop payments are based on the type of crop loss that the farmer suffered. As described above, these losses are broadly divided into three categories: (1) Sales; (2) Delivered and Unpaid; and (3) Not Delivered.<sup>695</sup>

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.<sup>696</sup> 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 crop categories—Sales, Delivered and Unpaid, and Not Delivered.<sup>697</sup>

### ***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.<sup>698</sup>

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.<sup>699</sup>

**Step One:** Determine the quantity of eligible specialty crops sold between January 15, 2020, and April 15, 2020.<sup>700</sup> Farmers must maintain records (such as bills of sale) that document the price they received for the crop.<sup>701</sup>

<sup>695</sup> CFAP Handbook, page 8-1, para. 211.A, page 8-45, para. 235.A (September 15, 2020).

<sup>696</sup> CFAP Handbook, page 8-23, para. 222.A (September 15, 2020).

<sup>697</sup> CFAP Handbook, page 8-45, para. 235.A (September 15, 2020).

<sup>698</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (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 (September 15, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020).

<sup>699</sup> CFAP Rule Correction, 85 Fed. Reg. 35,799, 25,799-35,800 (June 12, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.5(b)); CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(1), (h)); CFAP Handbook, page 8-48, para. 235.B (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (August 18, 2020).

<sup>700</sup> CFAP Handbook, page 2-16, para. 22.A, page 8-48, para. 235.B (September 15, 2020).

<sup>701</sup> See USDA, Specialty Crops and the Coronavirus Food Assistance Program, CFAP Payments for Specialty Crops, at: <https://www.farmers.gov/cfap1/specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (August 18, 2020). USDA says that AMS will use this documentation to verify a farmer's claims on a case-by-case basis.

**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 specialty crops that fall within the Sales category.<sup>702</sup>

**(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.<sup>703</sup>

**Step One:** Determine the quantity of specialty crops that fall within the category of Delivered and Unpaid. When requested by USDA, farmers must have documentation to show that no payment was received for these specialty crops.<sup>704</sup> 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.<sup>705</sup>

**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.<sup>706</sup> These include mature crops that remained unharvested between January 15, 2020, and April 15, 2020, due to a lack of marketing channels. For example, this would include crops that were plowed

<sup>702</sup> For the applicable payment rate, see USDA, Specialty Crops and the Coronavirus Food Assistance Program, CFAP Payments for Specialty Crops, at: <https://www.farmers.gov/cfap1/specialty>; see also CFAP Handbook, pages 8-45 through 8-47, para. 235.A (September 15, 2020).

<sup>703</sup> CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(2)); CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(2), (h)); CFAP Handbook, page 8-48, para. 235.B (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (August 18, 2020).

<sup>704</sup> See USDA, Specialty Crops and the Coronavirus Food Assistance Program, CFAP Payments for Specialty Crops, at: <https://www.farmers.gov/cfap1/specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (August 18, 2020). USDA says that AMS will use this documentation to verify a farmer's claims on a case-by-case basis.

<sup>705</sup> For the applicable payment rate, see USDA, Specialty Crops and the Coronavirus Food Assistance Program, CFAP Payments for Specialty Crops, at: <https://www.farmers.gov/cfap1/specialty>; see also CFAP Handbook, pages 8-45 through 8-47, para. 235.A (September 15, 2020).

<sup>706</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (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 (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (August 18, 2020).



under.<sup>707</sup> 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.<sup>708</sup> Finally, crops that were donated between January 15, 2020 and April 15, 2020 can also fall within the category of Not Delivered.<sup>709</sup>

The following steps are used to calculate the payment for specialty crops that fall within the category of Not Delivered.<sup>710</sup>

**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.<sup>711</sup>

**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.<sup>712</sup>

### ***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.<sup>713</sup>

### ***d. USDA Adjustment***

USDA may ask the producer for information in a spot check and may adjust the payments for the farmer.<sup>714</sup>

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<sup>707</sup> FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (August 18, 2020).

<sup>708</sup> FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (August 18, 2020).

<sup>709</sup> CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,800 (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?" (September 29, 2020).

<sup>710</sup> CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3)); CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)(3), (h)); CFAP Handbook, page 8-48, para. 235.B (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (August 18, 2020).

<sup>711</sup> See USDA, Specialty Crops and the Coronavirus Food Assistance Program, CFAP Payments for Specialty Crops, at: <https://www.farmers.gov/cfap1/specialty>; FSA Fact Sheet, Coronavirus Food Assistance Program for Specialty Crop Producers (August 18, 2020). USDA says that AMS will use this documentation to verify a farmer's claims on a case-by-case basis.

<sup>712</sup> For the applicable payment rate, see USDA, Specialty Crops and the Coronavirus Food Assistance Program, CFAP Payments for Specialty Crops, at: <https://www.farmers.gov/cfap1/specialty>; see also CFAP Handbook, pages 8-45 through 8-47, para. 235.A (September 15, 2020).

<sup>713</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(b)); CFAP Handbook, page 8-45, para. 235.A (September 15, 2020); FSA Notice CFAP-4, page 11, para. 4.B (May 20, 2020).

<sup>714</sup> CFAP Handbook, page 8-48, para. 235.B (September 15, 2020).



### 3. Calculating Livestock Payments—Cattle, Hogs and Pigs, and Sheep

CFAP payments for all eligible livestock—meaning cattle, hogs and pigs, and sheep—are calculated in the same way.<sup>715</sup> CARES Act funding is used to pay for losses to livestock that were owned and sold between January 15, 2020, and April 15, 2020.<sup>716</sup> CCC funds are used to pay for losses related to livestock that were owned and 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.<sup>717</sup> Only livestock that were sold between January 15, 2020, and April 15, 2020 must be unpriced or subject to price risk.<sup>718</sup>

The steps for livestock payment calculations are outlined below.<sup>719</sup>

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

The following steps are taken to determine the part of livestock payments that come from CARES Act funding.<sup>720</sup> These steps should be followed for each species and class of eligible livestock.

**Step One:** Determine the number of eligible owned and unpriced livestock—by species and class—that were sold between January 15, 2020, and April 15,

<sup>715</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (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 (September 15, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Livestock and the Coronavirus Food Assistance Program, CFAP Payments for Livestock, at: <https://www.farmers.gov/cfap1/livestock>.

<sup>716</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (prefatory comments); CFAP Handbook, page 6-45, para. 188.B (September 15, 2020).

<sup>717</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (prefatory comments); CFAP Handbook, page 6-22, para. 177.A, page 6-24, para. 178.A (August 14, 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?” (September 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (August 12, 2020); First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (prefatory comments).

<sup>718</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)). See also USDA, Coronavirus Food Assistance Program FAQ, “Can a producer get assistance if he/she didn’t sell calves between January and April?” (September 29, 2020), at: <https://www.farmers.gov/cfap1/faq>.

<sup>719</sup> For examples of how CFAP livestock payments are calculated, see CFAP Handbook, pages 6-46 through 6-51, para. 188.C (September 15, 2020).

<sup>720</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)); CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (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 (September 15, 2020).

2020.<sup>721</sup> This number should include any offspring from that inventory that were born before April 15, 2020.<sup>722</sup>

**Step Two:** Multiply the result of Step One by the pre-set CARES Act payment rate per head for that species of livestock.<sup>723</sup> 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.<sup>724</sup> 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.<sup>725</sup>

**Step Two:** Multiply the result of Step Three by the pre-set CCC payment rate for that species.<sup>726</sup> This amount represents the CCC part of a farmer's livestock payment.

***c. Total Payment for Livestock***

A farmer's CFAP payment for each eligible livestock species is the total of the CARES Act and CCC payments, as calculated above.<sup>727</sup>

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<sup>721</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)); CFAP Handbook, page 6-45, para. 188.B (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (August 12, 2020). The prior rule did not specify that the livestock must be unpriced. See CFAP Rule, 85 Fed. Reg. 30,825, 30,826, 30,832 (May 21, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)).

<sup>722</sup> CFAP Handbook, page 6-45, para. 188.B (September 15, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (August 12, 2020).

<sup>723</sup> For the applicable payment rates, see CFAP Handbook, page 6-45, para. 188.A (September 15, 2020); USDA, Livestock and the Coronavirus Food Assistance Program, CFAP Payments for Livestock, at: <https://www.farmers.gov/cfap1/livestock>; FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (August 12, 2020).

<sup>724</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f), (h)); CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833 (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 (September 15, 2020).

<sup>725</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)); CFAP Handbook, page 6-45, para. 188.B (September 15, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (August 12, 2020).

<sup>726</sup> For the applicable payment rate, see CFAP Handbook, page 6-45, para. 188.A (September 15, 2020); USDA, Livestock and the Coronavirus Food Assistance Program, CFAP Payments for Livestock, at: <https://www.farmers.gov/cfap1/livestock>; FSA Fact Sheet, Coronavirus Food Assistance Program for Livestock Producers (August 12, 2020).

<sup>727</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(c), (d), (f)); CFAP Handbook, page 6-45, para. 188.B (September 15, 2020).

Examples of how livestock payments work for a cow-calf operation, cattle feeder operation, short-term cattle grazing operation, and a farrow to wean hog operation can be found in the CFAP Handbook.<sup>728</sup>

#### 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.<sup>729</sup> 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 of 2020.<sup>730</sup> This production includes milk that was dumped.<sup>731</sup> 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.<sup>732</sup>

The steps for dairy payment calculations are outlined below.<sup>733</sup>

##### ***a. CARES Act Funding—Milk Production from First Quarter of 2020***

The following steps are taken to figure the part of dairy payments that come from CARES Act funding.<sup>734</sup> These steps apply to dairy operations that dissolved on or before March 31, 2020.<sup>735</sup>

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

<sup>728</sup> CFAP Handbook, pages 6-46 through 6-51, para. 188.C (September 15, 2020).

<sup>729</sup> CFAP Handbook, page 4-1, para. 85.A (September 15, 2020).

<sup>730</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e)); CFAP Handbook, page 4-71, para. 111.A-B (September 15, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020); USDA, Dairy and the Coronavirus Food Assistance Program, CFAP Payments for Dairy, at: <https://www.farmers.gov/cfap1/dairy>.

<sup>731</sup> CFAP Handbook, page 4-31, para. 96.B (September 15, 2020); USDA, Coronavirus Food Assistance Program FAQ, "If a dairy producer had to dump milk, will his/her dumped milk be covered?" (September 29, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (August 10, 2020).

<sup>732</sup> 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. 30,825, 30,826 (May 21, 2020) (prefatory comments); CFAP Handbook, pages 4-71 and 4-72, para. 111.A-B (September 15, 2020); USDA, Dairy and the Coronavirus Food Assistance Program, CFAP Payments for Dairy, at: <https://www.farmers.gov/cfap1/dairy>. For the definition of second quarter, see First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, "Second quarter").

<sup>733</sup> For examples of how CFAP dairy payments are calculated, see CFAP Handbook, pages 4-73 through 4-75, para. 111.C (September 15, 2020).

<sup>734</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e)(1)); CFAP Handbook, page 4-71, para. 111.A (September 15, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

<sup>735</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(e)(3)).

**Step Two:** Multiply the result of Step One by the pre-set CARES Act payment rate.<sup>736</sup> The result represents the CARES Act portion of a farmer's dairy payment.

***b. CCC Funding—Adjusted Milk Production for Second Quarter***

The following steps are taken to figure the part of dairy payments that come from CCC funding.<sup>737</sup> A new rule says that these steps apply to dairy operations that 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.<sup>738</sup>

**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.<sup>739</sup> 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.<sup>740</sup> 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.<sup>741</sup>

Examples of how dairy payments work can be found in the CFAP Handbook.<sup>742</sup>

<sup>736</sup> For the applicable payment rate, see 85 Fed. Reg. 30,825, 30,832-30,833, 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 (September 15, 2020); USDA, Dairy and the Coronavirus Food Assistance Program, CFAP Payments for Dairy, at: <https://www.farmers.gov/cfap1/dairy>; FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (August 10, 2020).

<sup>737</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e)(2)); CFAP Handbook, page 4-71, para. 111.B (September 15, 2020); FSA Notice CFAP-4, page 10, para. 4.B (May 20, 2020).

<sup>738</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,800 (June 12, 2020) (to be codified at 7 C.F.R. § 9.5(e)(3)); CFAP Handbook, page 4-31, para. 96.C (September 15, 2020).

<sup>739</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,826 (May 21, 2020) (prefatory comments); CFAP Handbook, page 4-1, para. 85.B (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (August 10, 2020).

<sup>740</sup> For the applicable payment rate, see 85 Fed. Reg. 30,825, 30,832-30,833, 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 (September 15, 2020); FSA Fact Sheet, Coronavirus Food Assistance Program for Dairy Producers (August 10, 2020).

<sup>741</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(e)); CFAP Handbook, page 4-71, para. 111.B (September 15, 2020).

<sup>742</sup> CFAP Handbook, page 4-73 to 4-75, para. 111.B (September 15, 2020).

## 5. Calculating Wool Payments

In general, CFAP payments for wool are based on a farmer's unpriced inventory as of January 15, 2020.<sup>743</sup> 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.<sup>744</sup> 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).<sup>745</sup>

### *e. CARES Act Funding Formula*

The following steps are taken to figure the part of wool payments that come from CARES Act funding.<sup>746</sup>

**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 total production of wool.<sup>747</sup>

**Step Two:** Multiply the result of Step One by the pre-set CARES Act payment rate.<sup>748</sup> This amount is the CARES Act part of a farmer's wool payment.

### *f. CCC Funding Formula*

The following steps are taken to calculate the part of wool payments that come from CCC funds.<sup>749</sup>

<sup>743</sup> First CFAP Rule Correction, 85 Fed. Reg. 35,799, 35,799 (June 12, 2020) (to be codified at 7 C.F.R. § 9.2, "Unpriced"); CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)); CFAP Handbook, pages 5-1 and 5-2, para. 125.B-C, pages 5-51 and 5-52, paras. 151.B, 152.A (September 15, 2020); USDA, Coronavirus Food Assistance Program FAQ, "What does 'unpriced' or 'subject to price risk' mean?" (September 29, 2020); USDA, Wool and the Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap1/wool>.

<sup>744</sup> For examples of forward contracts, see CFAP Handbook, pages 5-33 through 5-36, para. 141.D (September 15, 2020).

<sup>745</sup> CFAP Handbook, page 5-22, para. 137.B (September 15, 2020).

<sup>746</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)(1)); CFAP Handbook, page 5-52, para. 152.A (September 15, 2020); USDA, Wool and the Coronavirus Food Assistance Program, CFAP Payments for Wool, at: <https://www.farmers.gov/cfap1/wool>; FSA Fact Sheet, Coronavirus Food Assistance Program for Wool Producers (August 10, 2020).

<sup>747</sup> CFAP Handbook, page 5-1, para. 125.B, page 5-52, para. 152.A (September 15, 2020); USDA, Wool and the Coronavirus Food Assistance Program, CFAP Payments for Wool, at: <https://www.farmers.gov/cfap1/wool>. 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 (September 15, 2020).

<sup>748</sup> For the applicable payment rate, see CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833, 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 (September 15, 2020); USDA, Wool and the Coronavirus Food Assistance Program, CFAP Payments for Wool, at: <https://www.farmers.gov/cfap1/wool>.

<sup>749</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)(2)); CFAP Handbook, page 5-52, para. 152.A (September 15, 2020); USDA, Coronavirus Food Assistance Program for Wool Producers (May 2020).



**Step One:** Determine the farmer's eligible inventory for wool. This is the lesser of: (1) the farmer's unpriced wool inventory as of January 15, 2020; and (2) 50 percent of the farmer's 2019 total production of wool.<sup>750</sup>

**Step Two:** Multiply the result of Step One by the pre-set CCC payment rate.<sup>751</sup> This amount represents the CCC portion of a farmer's wool payment.

#### ***g. 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.<sup>752</sup>

### **6. Calculating Egg Payments**

Egg payments are based on a payment rate per pound of liquid egg production for January, February, and March in 2020, and on frozen egg production over that same time.<sup>753</sup>

#### ***a. Converting Eggs Still in the Shell to Pounds***

When farmers apply for CFAP they must self-certify their liquid and frozen egg production.<sup>754</sup> The self-certification is for January, February, and March 2020, and is certified as dollars per pound. Some farmers—such as those who are applying for CFAP for eggs that are sold to be broken but are still in the shell—will therefore need to convert their shell eggs into pounds.

USDA has a formula to follow to convert eggs still in a shell into pounds.<sup>755</sup> For the purpose of this formula, the standard weight assumed for thirty dozen eggs is forty-eight pounds. And USDA assumes that 83 percent of the shell egg is liquid egg.

For farmers who report eggs in cases, the number of pounds of egg production is equal to the number of cases multiplied by forty-eight pounds, multiplied again by 0.83.<sup>756</sup> For this formula, thirty dozen eggs are assumed to be in a case.

<sup>750</sup> CFAP Handbook, page 5-1, para. 125.B, page 5-52, para. 152.A (September 15, 2020); USDA, Wool and the Coronavirus Food Assistance Program, CFAP Payments for Wool, at: <https://www.farmers.gov/cfap1/wool>. 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 (September 15, 2020).

<sup>751</sup> For the applicable payment rate, see CFAP Rule, 85 Fed. Reg. 30,825, 30,832-30,833, 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 (September 15, 2020); USDA, Wool and the Coronavirus Food Assistance Program, CFAP Payments for Wool, at: <https://www.farmers.gov/cfap1/wool>.

<sup>752</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.5(g)); CFAP Handbook, page 5-1, para. 125.B (September 15, 2020).

<sup>753</sup> CFAP Handbook, page 2-15, para. 22.A (September 15, 2020); USDA, Eggs and the Coronavirus Food Assistance Program, CFAP Payments for Liquid and Frozen Eggs, at: <https://www.farmers.gov/cfap1/eggs>; FSA Fact Sheet, Coronavirus Food Assistance Program for Frozen and Liquid Eggs (August 14, 2020).

<sup>754</sup> CFAP Handbook, page 4-32, para. 97.A (September 15, 2020).

<sup>755</sup> CFAP Handbook, page 4-32, para. 97.A (September 15, 2020).

<sup>756</sup> CFAP Handbook, page 4-32, para. 97.A (September 15, 2020).

If the farmer reports eggs in dozens, instead of cases, a different formula is used. In that case, the number of pounds is equal to the number of dozen eggs multiplied by 1.6, and multiplied again by 0.83.<sup>757</sup>

### ***b. CARES Act Funding Formula***

The following steps are taken to figure out the part of egg payments that come from CARES Act funding.<sup>758</sup>

**Step One:** For both frozen and liquid eggs, determine the farmer's production of eggs, in pounds, for January, February, and March 2020.<sup>759</sup>

**Step Two:** Multiply the result of Step One by the appropriate CARES Act payment rate. That rate is 0.06 dollars per pound for frozen eggs, and 0.05 dollars per pound for liquid eggs.<sup>760</sup> This amount is the CARES Act part of a farmer's egg payment.

### ***c. CCC Funding Formula***

The following steps are taken to calculate the part of egg payments that come from CCC funds.<sup>761</sup>

**Step One:** Determine the farmer's production of both frozen and liquid eggs for January, February, and March 2020, in pounds.<sup>762</sup>

**Step Two:** Multiply the result of Step One by the appropriate CCC payment rate, which is 0.02 dollars per pound for both frozen eggs and liquid eggs.<sup>763</sup> This amount represents the CCC portion of a farmer's egg payment.

<sup>757</sup> CFAP Handbook, page 4-32, para. 97.A (September 15, 2020).

<sup>758</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 4-71, para. 111.A (September 15, 2020).

<sup>759</sup> CFAP Handbook, page 4-71, para. 111.A (September 15, 2020); USDA, Eggs and the Coronavirus Food Assistance Program, CFAP Payments for Liquid and Frozen Eggs, at: <https://www.farmers.gov/cfap1/eggs>.

<sup>760</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 4-71, para. 111.A (September 15, 2020); USDA, Eggs and the Coronavirus Food Assistance Program, CFAP Payments for Liquid and Frozen Eggs, at: <https://www.farmers.gov/cfap1/eggs>.

<sup>761</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 4-71, para. 111.A (September 15, 2020).

<sup>762</sup> CFAP Handbook, page 4-71, para. 111.A (September 15, 2020); USDA, Eggs and the Coronavirus Food Assistance Program, CFAP Payments for Liquid and Frozen Eggs, at: <https://www.farmers.gov/cfap1/eggs>.

<sup>763</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,593 (August 14, 2020); CFAP Handbook, page 4-71, para. 111.A (September 15, 2020); USDA, Eggs and the Coronavirus Food Assistance Program, CFAP Payments for Liquid and Frozen Eggs, at: <https://www.farmers.gov/cfap1/eggs>.

#### ***d. Total Payment for Eggs***

A farmer's CFAP payment for eggs is the total of the CARES Act and CCC egg payments, as calculated above.<sup>764</sup>

Examples of how egg payments work can be found in the CFAP Handbook.<sup>765</sup>

### **7. Calculating Aquaculture Payments**

There are three types of aquaculture losses for which a farmer can be paid.<sup>766</sup> The first type of loss, which is for paid for with CARES Act funds, is of inventory sold between January 15, 2020, and April 15, 2020. The second type of loss, paid for with CCC funds, is of inventory of market-ready fish not sold between January 15, 2020, and April 15, 2020. The final type of eligible loss is the loss of crayfish that cannot be sold in 2020 due to a loss of market. This type of loss is paid for with CCC funds.

Aquaculture payments are calculated the following way.

#### ***a. CARES Act Funding—Aquaculture Sold***

The following steps are taken to determine the part of an aquaculture payment that comes from CARES Act funding.<sup>767</sup>

**Step One:** Determine the farmer's eligible owned inventory of crayfish/crawfish, largemouth bass, carp, or salmon that was sold between January 15, 2020, and April 15, 2020.<sup>768</sup>

**Step Two:** Multiply the result of Step One by the appropriate CARES Act payment rate.<sup>769</sup> The resulting amount represents the CARES Act portion of a farmer's aquaculture payment.

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<sup>764</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,592 (August 14, 2020); CFAP Handbook, page 4-72, para. 111.B (September 15, 2020).

<sup>765</sup> CFAP Handbook, page 4-76, para. 111.D (September 15, 2020).

<sup>766</sup> CFAP Handbook, pages 7.5-8 through 7.5-10, para. 207.C-E (September 15, 2020).

<sup>767</sup> CFAP Handbook, page 7.5-10, para. 207.G (September 15, 2020).

<sup>768</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020) (prefatory remarks); CFAP Handbook, page 7.5-8, para. 207.C (September 15, 2020). The CFAP Rule outlines a separate payment calculation for crawfish/crayfish that were sold, but the Handbook combines crawfish/crayfish with the other types of eligible aquaculture species sold. It does not appear that this difference in organization alters the actual payment calculation for crayfish/crawfish losses.

<sup>769</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591, 49,593 (August 14, 2020); CFAP Handbook, page 7.5-8, para. 207.C (September 15, 2020); USDA, Aquaculture and the Coronavirus Food Assistance Program, CFAP Payments for Aquaculture, at: <https://www.farmers.gov/cfap1/aquaculture>.



### ***b. CCC Funding Formula—Aquaculture Not Sold***

The calculations for aquaculture losses that are paid for with CCC funds differ depending on whether or not the loss is of crawfish/crayfish or other eligible species.

#### **(i) All Eligible Aquaculture Species Not Sold, Except Crayfish/Crawfish**

The following steps are used to determine the payment for aquaculture species, other than crayfish/crawfish, that comes from CCC funding.<sup>770</sup>

**Step One:** For all eligible aquaculture species, except crayfish/crawfish, determine the farmer's highest owned inventory on a date selected by the farmer between January 15, 2020, and April 15, 2020.<sup>771</sup> To be eligible, the aquaculture must have been market size, but unable to be sold.

**Step Two:** Multiply the result of Step One by the appropriate CCC payment rate.<sup>772</sup>

#### **(ii) Crayfish/Crawfish Not Sold**

The following steps are used to determine the CFAP payment for crayfish/crawfish that comes from CCC funding.<sup>773</sup>

**Step One:** Determine the farmer's eligible inventory, in pounds, of crayfish/crawfish that were not sold as of April 15, 2020 due to a lack of market, and which will not be sold during calendar year 2020.<sup>774</sup>

**Step Two:** Multiply the result of Step One by the CCC payment rate of \$0.05 for crayfish/crawfish.<sup>775</sup>

<sup>770</sup> CFAP Handbook, page 7.5-9, para. 207.D (September 15, 2020).

<sup>771</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020) (prefatory remarks); CFAP Handbook, pages 7.5-8 and 7.5-9, para. 207.B, D (September 15, 2020).

<sup>772</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591, 49,593 (August 14, 2020); CFAP Handbook, page 7.5-9, para. 207.D (September 15, 2020); USDA, Aquaculture and the Coronavirus Food Assistance Program, CFAP Payments for Aquaculture, at: <https://www.farmers.gov/cfap1/aquaculture>.

<sup>773</sup> CFAP Handbook, page 7.5-10, para. 207.E (September 15, 2020).

<sup>774</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020) (prefatory remarks); CFAP Handbook, page 7.5-10, para. 207.E (September 15, 2020).

<sup>775</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591, 49,593 (August 14, 2020); CFAP Handbook, page 7.5-10, para. 207.E (September 15, 2020); USDA, Aquaculture and the Coronavirus Food Assistance Program, CFAP Payments for Aquaculture, at: <https://www.farmers.gov/cfap1/aquaculture>.

### ***c. Total Payment for Aquaculture***

A farmer's CFAP payment for aquaculture is the total of the CARES Act and CCC aquaculture payments, as calculated above.<sup>776</sup>

USDA may adjust the volume of inventory sold or available inventory if the numbers are unreasonable or not accurate, or to reflect the actual inventory based on evidence provided by the farmer.<sup>777</sup>

Examples of how aquaculture payments work can be found in the CFAP Handbook.<sup>778</sup>

## **8. Calculating Nursery and Floriculture Payments**

In general, the payments for nursery and floriculture are based on the wholesale value of the inventory multiplied by a payment rate set by USDA.<sup>779</sup>

There are two payment categories for nursery and floriculture: delivered and unpaid, and not delivered.<sup>780</sup>

### ***a. CARES Act Funds: Delivered and Unpaid***

The following steps are used to determine payments for losses of nursery and floriculture inventory that was shipped but later spoiled or was unpaid.<sup>781</sup>

**Step One:** Determine the farmer's eligible wholesale value of nursery and floriculture inventory that was shipped but later spoiled or was unpaid due to loss of marketing between January 15, 2020, and April 15, 2020 because of COVID-19.<sup>782</sup> This includes inventory that was donated, and for which no payment was or will be received, is also eligible.<sup>783</sup>

**Step Two:** Multiply the result of Step One by the CARES Act payment rate, which USDA set at 15.55 percent.<sup>784</sup> The resulting amount represents the CARES Act portion of a farmer's nursery crop payment.

<sup>776</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020); CFAP Handbook, page 7.5-8, para. 207.B (September 15, 2020); USDA, Aquaculture and the Coronavirus Food Assistance Program, CFAP Payments for Aquaculture, at: <https://www.farmers.gov/cfap1/aquaculture>.

<sup>777</sup> CFAP Handbook, page 7.5-10, para. 207.F (September 15, 2020).

<sup>778</sup> CFAP Handbook, pages 7.5-11 and 7.5-12, para. 207.H (September 15, 2020).

<sup>779</sup> CFAP Handbook, page 7.5-15, para. 208.E (September 15, 2020).

<sup>780</sup> CFAP Handbook, page 7.5-15, para. 208.E (September 15, 2020).

<sup>781</sup> CFAP Handbook, page 7.5-13, para. 208.C (September 15, 2020).

<sup>782</sup> CFAP Handbook, page 7.5-16, para. 208.H (September 15, 2020).

<sup>783</sup> CFAP Handbook, page 7.5-13, para. 208.C (September 15, 2020).

<sup>784</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020); CFAP Handbook, page 7.5-16, para. 208.H (September 15, 2020); USDA, Nursery Crops and the Coronavirus Food Assistance Program, CFAP Payments for Nursery Crops and Cut Flowers, at: <https://www.farmers.gov/cfap1/nursery>.

### ***b. CCC Funds: Not Delivered***

The following steps are used to determine payments for losses of nursery and floriculture inventory that was not delivered between January 15, 2020, and April 15, 2020, and which will not be sold, because of the complete loss of marketing channels due to COVID-19.<sup>785</sup> Inventory is based on the farmer's nationwide ownership interest in the crop.<sup>786</sup> It does not matter where the crop was produced or is stored. Ownership interest means the owner of the inventory. It does not mean ownership of the land where the commodity was produced.

**Step One:** Determine the farmer's eligible wholesale value of nursery and floriculture inventory that was not delivered.<sup>787</sup> This includes nursery and floriculture where: (1) shipments did not leave the farm; (2) shipments were donated; or (3) mature commodities were destroyed, and not delivered.<sup>788</sup>

**Step Two:** Multiply the result of Step One by the CCC payment rate, which USDA set at 13.45 percent.<sup>789</sup> The resulting amount represents the CARES Act portion of a farmer's aquaculture payment.

### ***d. Total Payment for Nursery and Floriculture***

A farmer's CFAP payment for aquaculture is the total of the CARES Act and CCC nursery and floriculture payments, as calculated above.<sup>790</sup>

The CFAP Handbook has an example of how nursery and floriculture payments might work.<sup>791</sup>

USDA is not required to document or verify the inventory values for nursery and floriculture.<sup>792</sup> USDA may, however, ask the farmer for evidence of inventory or sales if it has reason to question the ownership interest or the quantity of the inventory. In such as case, the USDA may ask the farer for evidence of inventory or sale, and evidence of wholesale prices. USDA may adjust the value of inventory shipped that spoiled or went unpaid or value of inventory not sold. USDA may do this if it decides the quantity is not reasonable or is not accurate, or if USDA decides that the actual wholesale value, not the retail value, needs to be used.

<sup>785</sup> CFAP Handbook, page 7.5-16, para. 208.H (September 15, 2020).

<sup>786</sup> CFAP Handbook, page 7.5-12, para. 208.D (August 14, 2020).

<sup>787</sup> CFAP Handbook, page 7.5-16, para. 208.H (September 15, 2020).

<sup>788</sup> CFAP Handbook, page 7.5-14, para. 208.D (September 15, 2020).

<sup>789</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020); CFAP Handbook, page 7.5-16, para. 208.H (September 15, 2020); USDA, Nursery Crops and the Coronavirus Food Assistance Program, CFAP Payments for Nursery Crops and Cut Flowers, at: <https://www.farmers.gov/cfap1/nursery>.

<sup>790</sup> NOFA, CFAP Additional Eligible Commodities, 85 Fed. Reg. 49,589, 49,591 (August 14, 2020); CFAP Handbook, page 7.5-16, para. 208.H (September 15, 2020); USDA, Nursery Crops and the Coronavirus Food Assistance Program, CFAP Payments for Nursery Crops and Cut Flowers, at: <https://www.farmers.gov/cfap1/nursery>.

<sup>791</sup> CFAP Handbook, page 7.5-13, para. 208.C, page 7.5-16, para. 208.I (September 15, 2020).

<sup>792</sup> CFAP Handbook, page 7.5-15, para. 208.F (September 15, 2020).

### **E. Payments Not Subject to USDA Offset**

Payments received under the CFAP direct payments are not subject to USDA offset.<sup>793</sup> This means that CFAP payments will not be withheld by USDA in order to satisfy a USDA debt.

### **F. Payments and Liens**

USDA will make CFAP payments to the farmer regardless of whether there are existing liens on the commodities that led to CFAP eligibility.<sup>794</sup>

### **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.<sup>795</sup> 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.<sup>796</sup> Payment limitations can be complicated, as can the strategies used by farmers to limit the effect of these rules.<sup>797</sup> USDA describes the payment limitation rules that apply for CFAP in detail.<sup>798</sup>

### **A. General Rule—\$250,000**

In general, no person may receive more than 250,000 dollars in CFAP payments.<sup>799</sup> 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.

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<sup>793</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(c)); CFAP Handbook, page 2-14, para. 22.A (September 15, 2020), page 3-23, para. 65.D (May 29, 2020); FSA Notice CFAP-4, page 10, para. 4.B (September 15, 2020); USDA, Coronavirus Food Assistance Program FAQ, “Can CFAP payments be withheld to satisfy a USDA debt?” (September 29, 2020), at: <https://www.farmers.gov/cfap1/faq>.

<sup>794</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(c)).

<sup>795</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.6(b)); CFAP Handbook, page 1-11, para. 3.G (September 15, 2020). This includes giving such permission to authorized representatives of USDA and the Government Accountability Office (GAO).

<sup>796</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1)); CFAP Handbook, pages 2-3 and 2-4, para. 16.A-B (September 15, 2020); Notice CFAP-4, page 6, para. 3.A (May 20, 2020).

<sup>797</sup> 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).

<sup>798</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); CFAP Handbook, pages 2-3 through 2-6.6, para. 16 (September 15, 2020).

<sup>799</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1)); CFAP Handbook, page 2-3, para. 16.A (September 15, 2020); Notice CFAP-4, page 6, para. 3.A (May 20, 2020).

The rules for joint operations, including general partnerships and joint ventures, are somewhat different.<sup>800</sup>

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

For a corporation, LLC, LP, trust, or estate, the payment limit may be increased to 500,000 dollars, and in some cases to 750,000 dollars.<sup>801</sup> 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.<sup>802</sup>

## **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.<sup>803</sup>

## **XI. CFAP and Appeals**

Farmers have the right to appeal certain adverse decisions that USDA makes with respect to CFAP.<sup>804</sup> USDA programs, including CFAP, are required to inform farmers, in writing, of any

<sup>800</sup> CFAP Handbook, page 2-3, para. 16.A (September 15, 2020); Notice CFAP-4, page 6, para. 3.A (May 20, 2020). Payments for joint operations, including a general partnership or joint venture, cannot be more than \$250,000 per person or legal entity that comprise first-level ownership of the general partnership or operation. This rule does not apply if the first-level member is another joint operation.

<sup>801</sup> The September 22, 2020 rule establishing the CFAP 2 program also amended the rules for the first CFAP program, extending the increased payment limitation rules to trusts and estates. See CFAP2 Rule, 85 Fed. Reg. 59,380 Final Rule (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(e)(2)); CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (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 (September 15, 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.

<sup>802</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1), (3)); CFAP Handbook, page 2-6.5, para. 16.D (September 15, 2020); Notice CFAP-4, page 6, para. 3.C (June 24, 2020). The attribution rules at 7 C.F.R. § 1400.105 (2020) also apply.

<sup>803</sup> 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.

<sup>804</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (prefatory remarks), 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(b)); CFAP Handbook, page 3-8, para. 51.E (September 15, 2020). The appeal regulations that apply to CFAP are found at 7 C.F.R. pts. 11 and 780.

adverse decision that is made with respect to the farmer.<sup>805</sup> 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.<sup>806</sup> There are multiple options for appealing to USDA—some options are informal, while others follow a more formal appeals process.

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.<sup>807</sup> 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.<sup>808</sup>

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.<sup>809</sup> Second, a farmer can appeal a decision related to the farmer's compliance with a program's requirements.<sup>810</sup> Third, a farmer can appeal a decision related to a program's payments or benefits.<sup>811</sup> 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.<sup>812</sup>

In order for any of these types of decisions to be appealable, it must result in an individual determination for the farmer.<sup>813</sup> In other words, the decision has to relate specifically to the farmer and not be a decision that is generally applicable to other farmers.<sup>814</sup> 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.

<sup>805</sup> 7 C.F.R. § 11.6(b) (2020); FSA Handbook, 1-APP, page 2-8, para. 12.A (September 12, 2016).

<sup>806</sup> 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 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.

<sup>807</sup> FSA Handbook, 1-APP, page 2-6, para. 11.A (September 12, 2016).

<sup>808</sup> 7 C.F.R. § 780.2, "Adverse decision" (2020).

<sup>809</sup> 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. 30,825, 30,827 (prefatory remarks), 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(b)); CFAP Handbook, page 3-8, para. 51.E (September 15, 2020).

<sup>810</sup> 7 C.F.R. § 780.4(b)(2) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016).

<sup>811</sup> 7 C.F.R. § 780.4(b)(3) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016).

<sup>812</sup> CFAP Handbook, page 3-8, para. 51.E (September 15, 2020).

<sup>813</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

<sup>814</sup> 7 C.F.R. § 780.5(a)(1) (2020); FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

## **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.<sup>815</sup> For example, a farmer cannot appeal how a program defines eligible crops, prices, or signup deadlines, because such decisions apply to all farmers who apply for the program.<sup>816</sup> With respect to CFAP, this means a farmer cannot appeal USDA's decision to include or exclude certain commodities from eligibility.<sup>817</sup> 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.<sup>818</sup> This includes statutory or regulatory formulas that are used when calculating a farmer's potential payments or benefits under a program.<sup>819</sup>

Farmers also are unable to appeal the denial of program benefits due to a lack of funding.<sup>820</sup> 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.<sup>821</sup> 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.<sup>822</sup> 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

<sup>815</sup> 7 C.F.R. § 780.5(a)(1) (2020); CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

<sup>816</sup> FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

<sup>817</sup> CFAP Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments).

<sup>818</sup> 7 C.F.R. § 780.5(a)(1) (2020); FSA Handbook, 1-APP, page 2-6, para. 11.A (September 12, 2016).

<sup>819</sup> 7 C.F.R. § 780.5(a)(2) (2020); FSA Handbook, 1-APP, page 2-6, para. 11.A (September 12, 2016).

<sup>820</sup> 7 C.F.R. § 780.5(a)(7) (2020); FSA Handbook, 1-APP, page 2-6, para. 11.A (September 12, 2016).

<sup>821</sup> FSA Handbook, 1-APP, page 2-50, para. 27.A, page 6-3, para. 72.B (September 12, 2016).

<sup>822</sup> 7 C.F.R. § 780.9 (2020); FSA Handbook, 1-APP, page 2-14, para. 14.E (September 12, 2016).

the farmer received the written adverse determination. A farmer may only mediate the same adverse decision once.<sup>823</sup>

A farmer cannot request mediation if the farmer first seeks to appeal the decision through NAD.<sup>824</sup>

## **2. Request Reconsideration**

If a farmer has been subject to an adverse decision, the farmer may request reconsideration of that decision.<sup>825</sup> 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.<sup>826</sup>

## **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.<sup>827</sup> 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.<sup>828</sup> 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.<sup>829</sup> The farmer may not, however, appeal to the county committee after having appealed to the state committee.

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<sup>823</sup> 7 C.F.R. § 780.9(b) (2020).

<sup>824</sup> 7 C.F.R. § 780.7(a) (2020).

<sup>825</sup> 7 C.F.R. § 780.7 (2020); FSA Handbook, 1-APP, page 2-13, para. 14.C (September 12, 2016).

<sup>826</sup> 7 C.F.R. § 780.7(b) (2020); FSA Handbook, 1-APP, page 2-13, para. 14.C (September 12, 2016).

<sup>827</sup> 7 C.F.R. § 780.8 (2020); FSA Handbook, 1-APP, page 2-12, para. 14.B (September 12, 2016).

<sup>828</sup> 7 C.F.R. § 780.10 (2020); FSA Handbook, 1-APP, page 2-13, para. 14.D (September 12, 2016).

<sup>829</sup> 7 C.F.R. § 780.10 (2020); FSA Handbook, 1-APP, page 2-13, para. 14.D (September 12, 2016).



## 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.<sup>830</sup> Although NAD is an organization within USDA, it is independent from all other offices and agencies within USDA.<sup>831</sup> 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.<sup>832</sup> 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.<sup>833</sup> 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.<sup>834</sup>

A NAD appeal is the final appeal within USDA that a farmer may make.<sup>835</sup> 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.<sup>836</sup> 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.<sup>837</sup> USDA regulations add to that list parental status, political beliefs,

<sup>830</sup> 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](https://www.fsa.usda.gov/Internet/FSA_File/1-app_ro2_a15.pdf). See also 7 C.F.R. pts. 11 and 780.

<sup>831</sup> 7 C.F.R. § 11.2(a) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016).

<sup>832</sup> 7 C.F.R. § 11.6(b) (2020); FSA Handbook, 1-APP, page 6-7, para. 74.A (September 12, 2016).

<sup>833</sup> For more details on how a NAD appeal works, see FSA Handbook, 1-APP, pt. 6 (September 12, 2016).

<sup>834</sup> FSA Handbook, 1-APP, page 6-41, para. 81.A, page 6-57, para. 88.B (September 12, 2016).

<sup>835</sup> 7 C.F.R. § 11.3 (2020); FSA Handbook, 1-APP, page 2-15, para. 14.F (September 12, 2016).

<sup>836</sup> 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).

<sup>837</sup> 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>.

and gender identity.<sup>838</sup> USDA regulations say discrimination means the unlawful treatment or denial of benefits, services, rights or privileges.<sup>839</sup> Discrimination can mean being excluded from participation in programs or denial of benefits.

## **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).<sup>840</sup>

## **C. Discrimination Complaint Form**

USDA has a discrimination complaint form.<sup>841</sup> The complaint form is available online.<sup>842</sup> Farmers may also get a copy of the form by sending an email to USDA.<sup>843</sup> Otherwise, farmers may write USDA to get a copy of the form.<sup>844</sup>

Alternatively, farmers can write a letter instead of using the official USDA complaint form.<sup>845</sup> 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.).<sup>846</sup> 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.<sup>847</sup> Either the farmer or an authorized representative must sign the form or letter.

<sup>838</sup> 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. 41,406 (July 16, 2014) (codified at 7 C.F.R. part 15d).

<sup>839</sup> 7 C.F.R. § 15d.3(a) (2020).

<sup>840</sup> 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).

<sup>841</sup> The complaint is form AD-3027, USDA Program Discrimination Complaint Form.

<sup>842</sup> 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](https://www.ascr.usda.gov/sites/default/files/Complain_combined_6_8_12_508_0.pdf)

<sup>843</sup> To receive a complaint form by email, send a request to SM.OASCR.Info.

<sup>844</sup> 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

<sup>845</sup> 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>.

<sup>846</sup> USDA Complaint Form, AD-3027 (January 19, 2012).

<sup>847</sup> 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).

## **D. Filing a Complaint**

To file a complaint, a person can use one of several methods.<sup>848</sup> If the complaint goes to the wrong agency, the agency should forward it to OASCR.<sup>849</sup>

### **1. Mail**

A farmer can mail the complaint to USDA at this address:<sup>850</sup>

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.<sup>851</sup>

### **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.<sup>852</sup>

## **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.<sup>853</sup> 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).<sup>854</sup>

<sup>848</sup> USDA, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020).

<sup>849</sup> USDA, Nondiscrimination Regulation § 7(a)(3) (October 5, 2015).

<sup>850</sup> USDA OASCR, How to File a Program Discrimination Complaint; USDA, Program Discrimination Complaint Filing: Frequently Asked Questions (June 15, 2020).

<sup>851</sup> 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>.

<sup>852</sup> USDA Complaint Form, AD-3027 (January 19, 2012). Use the following email address: [program.intake@usda.gov](mailto: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).

<sup>853</sup> USDA, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020); USDA, Program Discrimination Complaint Filing: Frequently Asked Questions (June 15, 2020).

<sup>854</sup> USDA, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020).

USDA says that persons with disabilities who require alternative means of communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202)720-2600.<sup>855</sup>

Farmers also can email USDA for help at [CR-INFO@ascr.usda.gov](mailto:CR-INFO@ascr.usda.gov).

#### **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.<sup>856</sup> 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.<sup>857</sup>

#### **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.<sup>858</sup> It is possible USDA will ask the farmer for more information.<sup>859</sup> If so, the farmer has thirty days to respond, although the farmer may ask for more time.<sup>860</sup> 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.<sup>861</sup> 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.<sup>862</sup> According to USDA, a complaint investigation is an impartial process designed to obtain the facts and evidence relevant to whether there was discrimination.<sup>863</sup>

USDA will then analyze the complaint and the report to reach a final decision on the complaint.<sup>864</sup> The decision should include an analysis of the claims and whether

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<sup>855</sup> USDA, Filing a Program Discrimination Complaint as a USDA Customer (June 15, 2020).

<sup>856</sup> 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).

<sup>857</sup> See USDA OASCR, How to File a Program Discrimination Complaint (June 15, 2020); USDA, Nondiscrimination Regulation § 7(b)(2) (October 5, 2015).

<sup>858</sup> USDA, How to File a Discrimination Complaint (June 15, 2020); USDA, Nondiscrimination Regulation § 7(c)(1)-(2) (October 5, 2015).

<sup>859</sup> USDA, Nondiscrimination Regulation § 7(c)(2) (October 5, 2015).

<sup>860</sup> USDA, Nondiscrimination Regulation § 7(c)(4) (October 5, 2015).

<sup>861</sup> 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).

<sup>862</sup> The Report of Investigation will be available to the farmer through the Freedom of Information Act.

<sup>863</sup> USDA, Nondiscrimination Regulation § 5(g), "Complaint Investigation" (October 5, 2015).

<sup>864</sup> USDA, Nondiscrimination Regulation §§ 5(k), "Final Agency Decision," 7(f) (October 5, 2015).

discrimination was found. USDA may conclude that the local USDA agency has adequately corrected the discrimination.<sup>865</sup>

If discrimination was found, USDA may try to settle the complaint and may take other corrective action.<sup>866</sup> If not, discrimination is found the case is closed. The final decision will be mailed to the farmer.

## **H. Mediation**

Along the way, USDA may offer mediation to the farmer.<sup>867</sup>

## **I. Disability Claims Somewhat Different**

Claims of discrimination based on disability operate under somewhat different rules.<sup>868</sup>

## **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.<sup>869</sup>

## **K. Reprisals**

USDA is not allowed to subject a person to reprisal for filing a complaint or opposing a discriminatory practice.<sup>870</sup> That means USDA may not intimidate, threaten, harass, coerce, discriminate against, or otherwise retaliate against that person.<sup>871</sup>

## **L. USDA Reporting on Discrimination Complaints**

The 2008 Farm Bill required USDA to report on civil rights matters.<sup>872</sup> USDA rules give responsibility for those reporting requirements to OASCR.<sup>873</sup> 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.<sup>874</sup> 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.

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<sup>865</sup> USDA, Nondiscrimination Regulation § 7(f) (October 5, 2015).

<sup>866</sup> USDA, Nondiscrimination Regulation §§ 5(l), "Settlement Agreement," 7(f) (October 5, 2015).

<sup>867</sup> USDA, Nondiscrimination Regulation § 7(d) (October 5, 2015).

<sup>868</sup> USDA, Nondiscrimination Regulation, § 7(f), (i) (October 5, 2015).

<sup>869</sup> USDA, Program Discrimination Complaint Filing: Frequently Asked Questions (June 15, 2020).

<sup>870</sup> 7 C.F.R. § 15d(3)(b) (2020)

<sup>871</sup> USDA Complaint Form, AD-3027 (January 19, 2012).

<sup>872</sup> Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, section 14007 (codified at 7 U.S.C. § 2279-2).

<sup>873</sup> 7 C.F.R. §§ 2.25(a)(22), 15d.4(c) (2020).

<sup>874</sup> 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.

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 filed by farmers.<sup>875</sup>

It appears that the last report was for the fiscal year 2016 and was completed in April 2017.<sup>876</sup> 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.<sup>877</sup>

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.<sup>878</sup> 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.

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<sup>875</sup> 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/hhr-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.

<sup>876</sup> 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](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).

<sup>877</sup> 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).

<sup>878</sup> 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>.



In the past USDA has had a great deal of difficulty conducting timely and effective civil rights investigations.<sup>879</sup> 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.

**N. Lawsuit Also Possible: Beware of Statute of Limitations**

Filing a federal lawsuit is also possible.<sup>880</sup> 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.<sup>881</sup>

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<sup>879</sup> See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

<sup>880</sup> USDA, Nondiscrimination Regulation § 7(a)(4), "Complaint Investigation" (October 5, 2015).

<sup>881</sup> 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, USDA announced that under CFAP USDA will purchase about three billion dollars of fresh produce, dairy, and meat.<sup>882</sup> The food purchases will result in boxes of fresh produce, dairy and meat that will be distributed to those in need, often through networks of 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).

On August 25, 2020, USDA announced additional funding of up to one billion dollars for the program.<sup>883</sup> As of September 29, 2020, USDA reported that over 100 million food boxes had been delivered.<sup>884</sup>

### 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 enters into contracts to purchase fresh fruits and vegetables, dairy, and meat directly from farmers and regional distributors. Second, food boxes are assembled. And finally, the food boxes are delivered to eligible recipients.

#### A. Government Contracts for Purchases of Food

To date, there have been three different rounds, or opportunities, for farmers and entities to contract with the government to fill and distribute boxes of fresh produce, dairy, and meat products under the Food Box Program.

Each round of contracts has involved different solicitations by the government that each cover a different time period.

##### 1. Round I: May 15, 2020 – June 30, 2020

On April 24, 2020, the first Request for Proposal (RFP) was published on the AMS website.<sup>885</sup> This initial RFP sought offers from farmers and other organizations and entities on a regional basis.<sup>886</sup>

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<sup>882</sup> 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>.

<sup>883</sup> USDA Press Release No. 0348.20, Trump Administration Announces Additional \$1 Billion for the Farmers to Families Food Box Program (August 25, 2020), at: <https://www.usda.gov/media/press-releases/2020/08/25/trump-administration-announces-additional-1-billion-farmers>.

<sup>884</sup> USDA Press Release No. 0384.20, Farmers to Families Food Box Program Surpasses 100 Million Boxes Delivered (September 29, 2020), at: <https://www.usda.gov/media/press-releases/2020/09/29/farmers-families-food-box-program-surpasses-100-million-boxes>.

<sup>885</sup> The RFP, Solicitation/Contract/Order for Commercial Items, AG-12-3J14-20-R-0377, is available on the AMS website, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

<sup>886</sup> 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



The deadline to submit an RFP for the first round was May 1, 2020.<sup>887</sup> On May 8, 2020, AMS published the list of contract award recipients, amounting to over 1.2 billion dollars in contracts.<sup>888</sup> Those who were awarded contracts were responsible for all aspects of the contract performance. This means they had to source the food for the boxes, assemble the food boxes, connect with eligible recipients, and deliver the food boxes to those recipients on a recurring basis.<sup>889</sup>

The initial performance period for the first round of contracts, what AMS is calling the “base period,” ran from May 15, 2020, through June 30, 2020.<sup>890</sup> There were also three additional two-month “option periods” that could extend the timeframe within which to deliver the boxes.

Of the 1.2 billion dollars in contracts awarded during this first round, USDA states that it purchased \$461 million dollars of fresh fruits and vegetables, \$317 million of dairy products, \$258 million of meat products, and \$175 million of combination boxes that included a mixture of fresh produce, dairy and meat products.<sup>891</sup>

## **2. Round II: July 1, 2020 – August 30, 2020**

A second round of contracts was announced on June 17, 2020, when USDA explained that USDA would be extending existing Food Box Program contracts—for certain recipients—for the period running from July 1, 2020, through August 30, 2020.<sup>892</sup> USDA also granted a limited number of new contracts to those who were previously denied contracts in the first round of RFPs due to technical errors. USDA aimed to purchase 1.47 billion dollars in food for the second round of contracts.<sup>893</sup>

## **3. Round III: September 1, 2020 – October 31, 2020**

The third round of the Food Box Program, which was announced on July 24, 2020, involves a two-step process.<sup>894</sup> First, entities interested in contracting with the government must submit a Basic Ordering Agreement (BOA) proposal, complete with

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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>.

<sup>887</sup> See RFP, Solicitation/Contract/Order for Commercial Items, AG-12-3J14-20-R-0377, page 1.

<sup>888</sup> 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>.

<sup>889</sup> See Request for Proposals Frequently Asked Questions, “Please explain the goal of the government regarding execution of these contracts?” (April 27, 2020), at: <https://www.ams.usda.gov/publications/content/request-proposals-frequently-asked-questions>.

<sup>890</sup> See Farmers to Families Food Box Program FAQs, Questions Posted 4/27/2020; see also RFP—ERAcquisition No. AG-12-3J14-20-R-0377 (pdf), page 6.

<sup>891</sup> USDA Press Release No. 0302.20, USDA Farmers to Families Food Box Program Reaches 20 Million Boxes Distributed (June 23, 2020), at: <https://www.usda.gov/media/press-releases/2020/06/23/usda-farmers-families-food-box-program-reaches-20-million-boxes>.

<sup>892</sup> USDA Press Release, USDA Extends Farmers to Families Food Box Program Contracts for Some Vendors (June 17, 2020), at: <https://www.usda.gov/media/press-releases/2020/06/17/usda-extends-farmers-families-food-box-program-contracts-some>.

<sup>893</sup> USDA Press Release No. 0330.20, USDA Announces a Third Round of Farmers to Families Food Box Program Purchases (July 24, 2020), at: <https://www.usda.gov/media/press-releases/2020/07/24/usda-announces-third-round-farmers-families-food-box-program>.

<sup>894</sup> USDA Press Release No. 0330.20, USDA Announces a Third Round of Farmers to Families Food Box Program Purchases (July 24, 2020), at: <https://www.usda.gov/media/press-releases/2020/07/24/usda-announces-third-round-farmers-families-food-box-program>.

all of the required documentation.<sup>895</sup> The government will review the proposals and then issue BOAs to approved entities. In step two, the government will issue additional solicitations for specific food box needs. These solicitations, however, will only go to those entities that already received a BOA. In other words, the BOA does not guarantee that an entity will receive a contract for food box delivery, but only those entities with BOAs will have the opportunity to contract with the government for the third round of the Food Box Program.

## **B. Content of Eligible Food Boxes**

The farmers and distributors who receive contracts under the Food Box Program must provide food boxes with specific assortments of food. The required content of the food boxes differs between the first two rounds of the program and the third round.

### **1. Content of Boxes for Rounds I and II**

Under the first two rounds of the Food Box Program, there were five different types of eligible food boxes: (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.<sup>896</sup> For these rounds, the distributors and recipients could mutually agree on the size and weight of the food boxes, as well as the specific contents, which may have depended on availability and local preferences.<sup>897</sup>

### **2. Content of Boxes for Round III**

When the solicitation for the third round BOA was first released, there was only one type of eligible food box allowed, a combination box.<sup>898</sup> Then on August 7, 2020, USDA issued an amendment to the BOA that allows for three additional types of food boxes for the third round of the Food Box Program.<sup>899</sup> Accordingly, the following four types of food boxes are eligible.

#### **a. Combination Box**

The combination box must include all of the following: (1) ten to twelve pounds of fruits and vegetables; (2) five to six pounds of at least two types of dairy, and the equivalent of one gallon of 2 percent or whole milk; and (3) meat and egg or egg products, including five to six pounds of at least two pre-cooked frozen or

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<sup>895</sup> The BOA, Combined Synopsis/Solicitation, 12-3J14-20-B-0588, can be downloaded at: [https://www.ams.usda.gov/sites/default/files/media/FFFB\\_solicitationRound3.pdf](https://www.ams.usda.gov/sites/default/files/media/FFFB_solicitationRound3.pdf).

<sup>896</sup> See RFP—ERAcquisition (pdf), Solicitation/Contract/Order for Commercial Items, AG-12-3J14-20-R-0377, page 5, (April 24, 2020), at: [https://www.ams.usda.gov/sites/default/files/media/RFP\\_ERAcquisition.pdf](https://www.ams.usda.gov/sites/default/files/media/RFP_ERAcquisition.pdf). Raw milk is not allowed under the Food Box Program. See Request for Proposals Frequently Asked Questions, “Please clarify if raw milk and ‘lunch meat’ are acceptable content for the boxes” (April 27, 2020), at: <https://www.ams.usda.gov/publications/content/request-proposals-frequently-asked-questions>.

<sup>897</sup> See Farmers to Families Food Box Program FAQs, “How many pounds of food per box of dairy, protein and produce?” (April 27, 2020), at: <https://www.ams.usda.gov/publications/content/farmers-families-food-box-program-faqs>.

<sup>898</sup> See BOA, Combined Synopsis/Solicitation, 12-3J14-20-B-0588, pages 4-5.

<sup>899</sup> See Amendment of Solicitation/Modification of Contract, at: [https://www.ams.usda.gov/sites/default/files/media/FFFB\\_solicitationRound3amendment.pdf](https://www.ams.usda.gov/sites/default/files/media/FFFB_solicitationRound3amendment.pdf).

refrigerated meat items and thirty-two ounces or less of whole eggs or egg products.<sup>900</sup>

**b. *Fresh Fruit and Vegetable Box***

A fresh fruit and vegetable box must contain fifteen to twenty pounds of fruits and vegetables, including: (1) four to six pounds of root vegetables (such as potatoes, yams, onions, and carrots); (2) four to six pounds of fruits with a longer storage life (such as stone fruits, apples, melons, and citrus); (3) one or two leaf or leaf stalk vegetables; and (4) one or two locally-grown fruits or vegetables, if available, or an increase in other fruits or vegetables of locally grown are not available.<sup>901</sup>

**c. *Meat Box***

A meat box must contain fifteen to eighteen pounds of at least four different meat and/or egg items that are suitable for individual households.<sup>902</sup> The meat must be pre-cooked, with no more than three pounds of luncheon meat. The eggs can either be whole, intact eggs or egg products such as hard-boiled eggs, egg patties or omelets.

**d. *Dairy Box***

A dairy box must contain eight to twelve pounds of at least three different dairy items, plus one to two gallons of 2 percent or whole milk.<sup>903</sup> The total weight of a dairy box, including the milk, must be between seventeen and twenty-one pounds.

**C. *Distribution to Eligible Recipients***

The food boxes must be distributed to eligible recipients. During rounds I and II of the program, the solicitations focused on ensuring that contract recipients delivered the boxes to nonprofit organizations or government entities, which would then be responsible for getting the food boxes to those in need.<sup>904</sup> During round III, USDA placed more of an emphasis on contractors being responsible for coordinating the delivery of the boxes directly to those in need.<sup>905</sup>

<sup>900</sup> See BOA, Combined Synopsis/Solicitation, 12-3J14-20-B-0588, pages 4-5.

<sup>901</sup> See Amendment of Solicitation/Modification of Contract, at: [https://www.ams.usda.gov/sites/default/files/media/FFFB\\_solicitationRound3amendment.pdf](https://www.ams.usda.gov/sites/default/files/media/FFFB_solicitationRound3amendment.pdf).

<sup>902</sup> See Amendment of Solicitation/Modification of Contract, at: [https://www.ams.usda.gov/sites/default/files/media/FFFB\\_solicitationRound3amendment.pdf](https://www.ams.usda.gov/sites/default/files/media/FFFB_solicitationRound3amendment.pdf).

<sup>903</sup> See Amendment of Solicitation/Modification of Contract, at: [https://www.ams.usda.gov/sites/default/files/media/FFFB\\_solicitationRound3amendment.pdf](https://www.ams.usda.gov/sites/default/files/media/FFFB_solicitationRound3amendment.pdf).

<sup>904</sup> See RFP—ERAcquisition (pdf), Solicitation/Contract/Order for Commercial Items, AG-12-3J14-20-R-0377, page 6 (April 24, 2020), at:

[https://www.ams.usda.gov/sites/default/files/media/RFP\\_ERAcquisition.pdf](https://www.ams.usda.gov/sites/default/files/media/RFP_ERAcquisition.pdf).

<sup>905</sup> See BOA, Combined Synopsis/Solicitation, 12-3J14-20-B-0588, pages 4, 8, at: [https://www.ams.usda.gov/sites/default/files/media/FFFB\\_solicitationRound3.pdf](https://www.ams.usda.gov/sites/default/files/media/FFFB_solicitationRound3.pdf).

## 1. Distribution During Rounds I and II

For rounds I and II, eligible recipients of food boxes include nonprofit entities that have a IRS section 501(c)(3) tax exempt status, as well as government entities.<sup>906</sup> 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.<sup>907</sup> Indian tribal organizations qualify as government entities, and are eligible recipients as well.<sup>908</sup> Although nonprofits and government entities are the recipients of the food boxes, the contractor remains responsible for ensuring that the food is ultimately delivered to those in need.<sup>909</sup>

There is no pre-determined delivery schedule for food boxes in rounds I and II. 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.<sup>910</sup>

## 2. Distribution During Round III

For round III of the Food Box Program, contract recipients are required to coordinate the delivery of food boxes to food insecure populations.<sup>911</sup> USDA defines food insecure populations as the end food box recipients that are experiencing disruptions of food intake or supply patterns because of a lack of money or other resources. In other words, those who receive government contracts for food boxes in round III are responsible for coordinating and executing all aspects of the delivery of food box to the end recipients.<sup>912</sup> This could include establishing a network of non-profit and government organizations that can help to distribute the food boxes those in need.

As with rounds I and II, applicants applying to contract with the government for round III of the Food Box Program must come to an agreement for a delivery schedule with

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<sup>906</sup> See Farmers to Families Food Box Program FAQs, “What entities will be eligible to receive food from contracted distributors?” (April 27, 2020), at:

<https://www.ams.usda.gov/publications/content/farmers-families-food-box-program-faqs>.

<sup>907</sup> See Request for Proposals Frequently Asked Questions, “Who can receive food under this program?” (April 27, 2020); see also RFP—ERAcquisition (pdf), Solicitation/Contract/Order for Commercial Items, AG-12-3J14-20-R-0377, page 6; Farmers to Families Food Box Program FAQs, “What entities will be eligible to receive food from contracted distributors?” (April 27, 2020), at:

<https://www.ams.usda.gov/publications/content/farmers-families-food-box-program-faqs>.

<sup>908</sup> See Farmers to Families Food Box Program FAQs, “Are Indian Tribal Organizations (ITOs) eligible?” (April 27, 2020), at: <https://www.ams.usda.gov/publications/content/farmers-families-food-box-program-faqs>.

<sup>909</sup> See RFP—ERAcquisition (pdf), Solicitation/Contract/Order for Commercial Items, AG-12-3J14-20-R-0377, page 6 (April 24, 2020), at:

[https://www.ams.usda.gov/sites/default/files/media/RFP\\_ERAcquisition.pdf](https://www.ams.usda.gov/sites/default/files/media/RFP_ERAcquisition.pdf).

<sup>910</sup> See Request for Proposals Frequently Asked Questions, “How frequently should deliveries take place to non-profit entities?” (April 27, 2020), at:

<https://www.ams.usda.gov/publications/content/request-proposals-frequently-asked-questions>; see also RFP—ERAcquisition (pdf), Solicitation/Contract/Order for Commercial Items, AG-12-3J14-20-R-0377, Exhibit 2.

<sup>911</sup> BOA, Combined Synopsis/Solicitation, 12-3J14-20-B-0588, page 4.

<sup>912</sup> BOA, Combined Synopsis/Solicitation, 12-3J14-20-B-0588, page 8.

any potential partner organizations that are assisting in the distribution of the food boxes to those in need.<sup>913</sup> USDA does not set a pre-determined delivery schedule.

### **III. Additional Requirements**

For each of the rounds of the Food Box Program the government solicitations include numerous other requirements that applicants must comply with. These include requirements for quality control of the food box contents, packaging, and delivery. Anyone interesting in contracting with the government should carefully review the entire solicitation, including any and all amendments.<sup>914</sup>

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<sup>913</sup> BOA, Combined Synopsis/Solicitation, 12-3J14-20-B-0588, page 29.

<sup>914</sup> A list of the solicitations published for rounds I, II and III, including the relevant amendments, can be found on the AMS website, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.