

# Farmers' Guide to Coronavirus Food Assistance Program 2 (CFAP 2)

## Second Edition

June 17, 2021

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

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Farmers' Legal Action Group

# **Farmers' Guide to Coronavirus Food Assistance Program 2 (CFAP 2)**

## **Second Edition**

June 17, 2021

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Copyedited by Wendy Reid

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

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## Chapter One: Introduction

On September 17, 2020, the United States Department of Agriculture (USDA) announced the creation of the Coronavirus Food Assistance Program 2 (CFAP 2). CFAP 2 is a direct payment program for farmers run by USDA. USDA says the purpose of CFAP 2 direct payments is to give assistance to farmers affected by the COVID-19 crisis. The original signup period for CFAP 2 began on September 21, 2020, and ended on December 11, 2020.<sup>1</sup> The signup period was reopened on April 5, 2021.<sup>2</sup>

This Farmers' Guide to the Coronavirus Food Assistance Program 2 (CFAP 2), Second Edition, is intended to explain how CFAP 2 works.<sup>3</sup>

The introductory chapter describes very briefly the outlines of CFAP 2 and its background. Later chapters describe eligibility rules for CFAP 2 and how USDA says the program will work, including how payments will be calculated. In addition, this Second Edition of the Guide includes recent changes USDA has made to CFAP 2.<sup>4</sup>

### I. Deadline Extended

Previously, the signup for CFAP 2 began on September 21, 2020, and ended on December 11, 2020.<sup>5</sup> In a recent Notice, however, FSA re-opened the application period for CFAP 2 as of April 5, 2021.<sup>6</sup> USDA says it will announce the end date of the signup period later, but it will remain open for at least sixty days.<sup>7</sup>

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<sup>1</sup> CFAP 2 Rule, 85 Fed. Reg. 59, 376, 59,385 (September 22, 2020) (to be codified at 7.C.F.R. § 9.4(a)(2)); CFAP 2 Handbook, page 2-14, para. 21.B (April 14, 2021).

<sup>2</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, (March 23, 2021); USDA, Coronavirus Food Assistance Program FAQ (CFAP FAQ), Frequently Asked Questions, "When does the reopening of the CFAP 2 signup start and end?" (April 22, 2021).

<sup>3</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>4</sup> USDA Press Release No. 0008.21, USDA Offers Additional Assistance for Certain Producers Through Coronavirus Food Assistance Program (April 14, 2021), at: <https://www.usda.gov/media/press-releases/2021/01/15/usda-offers-additional-assistance-certain-producers-through>.

<sup>5</sup> CFAP 2 Rule, 85 Fed. Reg. 59, 376, 59,385 (September 22, 2020) (to be codified at 7.C.F.R. § 9.4(a)(2)); CFAP 2 Handbook, page 2-14, para. 21.B (April 14, 2021).

<sup>6</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, (March 23, 2021); USDA, CFAP FAQ, "When does the reopening of the CFAP 2 signup start and end?" (April 22, 2021).

<sup>7</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, (March 23, 2021); USDA, CFAP FAQ, "When does the reopening of the CFAP 2 signup start and end?" (April 22, 2021); USDA CFAP 2 Fact Sheet, at 1 (April 27, 2021); USDA, After Identifying Gaps in Previous Aid, USDA Announces 'Pandemic Assistance for Producers' to Distribute Resources More Equitably (March 24, 2021), at: <https://www.fsa.usda.gov/state-offices/Minnesota/news-releases/2021/after-identifying-gaps-in-previous-aid-usda-announces-pandemic-assistance-for-producers-to-distribute-resources-more-equitably>. See, as well, FSA Notice CFAP- 18, Approval of CARES Act-Funded Applications for Tobacco Only (April 19, 2021), and USDA, CFAP FAQ, "I grow tobacco on my farm. Will I receive a payment?" (April 22, 2021).

## II. CFAP 2 vs. CFAP 1

This Guide describes the rules for CFAP 2, including changes made by the 2021 Appropriations Act. Earlier in 2020, USDA created a program with a similar purpose—to help farmers affected by COVID-19. That earlier program was initially called the Coronavirus Food Assistance Program, or CFAP. It is now being called CFAP 1 by USDA. This Guide will use the acronyms CFAP 1 and CFAP 2 as well.

### A. CFAP 2 is Different from CFAP 1

Although both CFAP 2 and CFAP 1 are intended to help farmers facing COVID-19, they are completely different programs.

With very limited exceptions, CFAP 1 is completed, and USDA is not accepting any new CFAP 1 applications.<sup>8</sup> For information on CFAP 1, including deadlines and other details, see the FLAG publication, Farmers' Guide to the Coronavirus Food Assistance Program (CFAP), Third Edition.<sup>9</sup>

### B. Interaction of CFAP 2 and CFAP 1

As a practical matter, CFAP 2 and CFAP 1 are almost completely separate from one another. A number of the rules for the two programs are similar. The application forms look similar, but many of the most important rules are quite different, including the time period that is taken into account for payments.

The interaction of the two programs works the following way.

First, if a farmer applied for CFAP 1, and wants to participate in CFAP 2, the farmer must apply again.<sup>10</sup> An application for CFAP 1 does not mean the farmer is automatically signed-up for CFAP 2.

Second, if a farmer applied for CFAP 1 and was not eligible for a payment, the farmer can still apply for CFAP 2. In fact, for many farmers that found CFAP 1 not helpful, CFAP 2 could provide a significant benefit.

<sup>8</sup> Recent changes to CFAP 1 have increased payments for hog and pig producers. See CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4877 (prefatory remarks) (January 19, 2021). For additional details on these changes, see FLAG's Farmers' Guide to 2021 CFAP Changes: Contract Farmers and Others, available for download at: <http://www.flaginc.org/2021/02/farmers-guide-to-2021-cfap-changes-contract-farmers-and-others-february-18-2021/>. Some producers who previously applied for CFAP 1 may also be eligible for increased payments for eligible cattle. See FSA Notice CFAP-16, Coronavirus Food Assistance Program (CFAP 1) Cattle Inventory Review of AD-3115's Before Cattle "Top Up" Payments (April 1, 2021), at: [https://www.fsa.usda.gov/Internet/FSA\\_Notice/cfap\\_16.pdf](https://www.fsa.usda.gov/Internet/FSA_Notice/cfap_16.pdf). Farmers who previously applied for CFAP 1 for hogs, pigs, or cattle do not need to take any actions in order to receive the increased payments. See CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4877 (prefatory remarks) (January 19, 2021); USDA, CFAP FAQ, "I applied for CFAP 1 and received payments for my cattle. Do I need to do anything to receive the increased payment?" (April 22, 2021).

<sup>9</sup> The Third Edition of the Farmers' Guide to the Coronavirus Food Assistance Program (CFAP), is available for download at: <http://www.flaginc.org/2020/10/farmers-guide-to-the-coronavirus-food-assistance-program-cfap-3rd-edition-october-23-2020/>.

<sup>10</sup> USDA, CFAP FAQ, "I applied for CFAP 1. Do I need to apply for CFAP 2?" (November 2, 2020). This question no longer appears on the USDA FAQ page.

Third, if a farmer did not apply for CFAP 1, the farmer can still apply for CFAP 2.<sup>11</sup> There is no requirement that a farmer who is interested in CFAP 2 have applied for CFAP 1. As noted above, for many farmers that found CFAP 1 not helpful, CFAP 2 could provide a significant benefit.

### III. Authority and Rules for CFAP 2

CFAP 2 is carried out by the USDA Farm Service Agency (FSA).<sup>12</sup> The USDA's Agricultural Marketing Service (AMS) assists FSA.

The authority and rules for CFAP 2 that are discussed in this Guide are found in several places.

#### A. Acts of Congress

The following Acts of Congress govern CFAP 2.

##### 1. Consolidated Appropriations Act, 2021

On December 27, 2020, the Consolidated Appropriations Act, 2021 (2021 Appropriations Act), became law.<sup>13</sup> The 2021 Appropriations Act gave more money to CFAP.<sup>14</sup> It also changed some of the rules for CFAP 1 and CFAP 2.<sup>15</sup>

This Guide refers to this as the "2021 Appropriations Act."

##### 2. Coronavirus Aid, Relief, and Economic Security Act (March 27, 2020)

The Coronavirus Aid, Relief, and Economic Security Act, which became law on March 27, 2020, first created CFAP—what is now known as CFAP 1.<sup>16</sup> For CFAP 2, the CARES Act provides authority for the USDA to assist tobacco farmers.<sup>17</sup>

This Guide refers to this as the "CARES Act."

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<sup>11</sup> USDA, CFAP FAQ, "I applied for CFAP 1. Do I need to apply for CFAP 2?" (November 2, 2020). This question no longer appears on the USDA FAQ page.

<sup>12</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,825 (May 21, 2020) (prefatory comments).

<sup>13</sup> Consolidated Appropriations Act, 2021 (2021 Appropriations Act), 116 Pub. Law 260 (December 27, 2020). As a bill it was known as H.R. 133. A copy can be found here: <https://www.congress.gov/bill/116th-congress/house-bill/133/text>.

<sup>14</sup> 2021 Appropriations Act § 751 (December 27, 2020).

<sup>15</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4877 (prefatory remarks) (January 19, 2021). USDA says more changes are coming.

<sup>16</sup> CARES Act § 1102 (March 27, 2020). The CARES Act is the Coronavirus Aid, Relief, and Economic Security 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>17</sup> Funds for tobacco farmers comes from the CARES Act. CFAP 2 Handbook, page 7-1, para. 211.B (April 14, 2021). For the CARES Act, see CARES Act, Division B—Emergency Appropriations for Coronavirus Health Response and Agency Operations, Title I, Agricultural Programs, Office of the Secretary, 116 Public Law 136, 134 Stat. 281 (March 27, 2020). A copy can be found here: <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

### 3. Commodity Credit Corporation (CCC) Charter

Most of the money for CFAP 2 goes through the Commodity Credit Corporation (CCC).<sup>18</sup> Federal statutes governing the CCC set some limits on how the money can be used.<sup>19</sup> In general, however, CCC authority is very broad.<sup>20</sup>

#### B. USDA Regulations

Regulations for CFAP 2 can be found in various rules published in the Federal Register. The first rule specifically addressing CFAP 2 was published on September 22, 2020.<sup>21</sup> More recent changes affecting CFAP 2 were published on January 19, 2021.<sup>22</sup> Those regulations will eventually become a part of the Code of Federal Regulations.<sup>23</sup>

#### C. Handbooks

FSA issues Handbooks that control many aspects of various FSA programs. FSA first issued a Handbook for CFAP 2 on September 17, 2020.<sup>24</sup> On April 14, 2021, USDA revised its CFAP 2 Handbook.<sup>25</sup> This revised CFAP-2 Handbook adopts many of the changes made in the 2021 Appropriations Act. The Handbook also includes changes by USDA based on USDA's authority to set the rules for CFAP.<sup>26</sup> USDA says these changes were made in response to USDA's ongoing evaluation of CFAP and on USDA's understanding of farmer need.

FSA also relies on other Handbooks to set part of the CFAP 2 rules.<sup>27</sup>

<sup>18</sup> The breadth of CCC authority is discussed in Congressional Research Service, The Commodity Credit Corporation (CCC), Report No. 44606 (January 14, 2021), at: <https://fas.org/sgp/crs/misc/R44606.pdf>.

<sup>19</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 (CCC), Report No. 44606 (January 14, 2021).

<sup>20</sup> USDA relies on 15 U.S.C. § 714b of the CCC charter for authority to create the CFAP program. CFAP 1 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 1 Rule, 85 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>21</sup> USDA, Coronavirus Food Assistance Program (CFAP 2 Rule), 85 Fed. Reg. 59,380 (September 22, 2020) (to be codified at 7 C.F.R. pt. 9).

<sup>22</sup> USDA, Coronavirus Food Assistance Program; Additional Assistance (CFAP Additional Assistance Rule), 86 Fed. Reg. 4877 (January 19, 2021) (to be codified at 7 C.F.R. pt. 9).

<sup>23</sup> CFAP 2 regulations will be found at 7 C.F.R. Part 9.

<sup>24</sup> See FSA Handbook, 3-CFAP, Coronavirus Food Assistance Program 2 (September 17, 2020), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/3-cfap\\_roo\\_a01.pdf](https://www.fsa.usda.gov/Internet/FSA_File/3-cfap_roo_a01.pdf).

<sup>25</sup> FSA Handbook, 3-CFAP, Coronavirus Food Assistance Program 2 (April 14, 2021) (CFAP 2 Handbook), at: [https://www.fsa.usda.gov/Internet/FSA\\_File/3-cfap\\_roo\\_a05.pdf](https://www.fsa.usda.gov/Internet/FSA_File/3-cfap_roo_a05.pdf).

<sup>26</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877 (prefatory remarks) (January 19, 2021).

<sup>27</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>28</sup> The most recent Notices impacting CFAP 2 were issued on March 23, 2021, and April 19, 2021.<sup>29</sup> This Guide includes Notices released to the public by USDA through May 31, 2021.

## **E. USDA CFAP Fact Sheets**

USDA sometimes issues Fact Sheets on CFAP 2. The Fact Sheets can be found on the USDA website, and are sometimes updated.<sup>30</sup> The most recent general CFAP 2 Fact Sheet is dated April 27, 2021.

## **F. USDA Website for CFAP 2**

USDA sometimes sets policy for CFAP 2 and other programs through the USDA website for CFAP 2.<sup>31</sup> Among other things, the CFAP 2 website provides information on each type of eligible commodity.<sup>32</sup> The website also has a Frequently Asked Questions page that is occasionally updated,<sup>33</sup> and has detailed information on how to apply for the program.<sup>34</sup> At times, the USDA website has had a CFAP 2 Eligible Commodities Finder that allows farmers to determine whether their specific crops are eligible for CFAP 2.<sup>35</sup>

# **IV. Summary of Recent Changes to CFAP 2**

The following sections briefly describe some of the recent changes to CFAP 2 discussed in this Guide.

## **A. CFAP 2 Application Signup Reopened April 5, 2021**

The original signup period for CFAP 2 began on September 21, 2020, and ended on December 11, 2020.<sup>36</sup> USDA later extended the deadline for some farmers—including contract producers and farmers raising pullets or turfgrass sod—until February 26, 2021.<sup>37</sup>

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<sup>28</sup> See, for example, FSA Notice CFAP-11, CFAP 2 Definition of Contract Grower, (October 5, 2020). Notices may be downloaded from the FSA website. To search for downloadable FSA Notices, visit <https://www.fsa.usda.gov/FSA/notices>.

<sup>29</sup> FSA Notice CFAP-18, Approval of CARES Act-Funded Applications for Tobacco Only (April 19, 2021). FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates (March 23, 2021).

<sup>30</sup> USDA, Coronavirus Food Assistance Program 2 Fact Sheet (April 27, 2021), at <https://www.farmers.gov/sites/default/files/documents/cfap2-factsheet-04272021-english.pdf>.

<sup>31</sup> The main website for CFAP 2 can be found at: <https://www.farmers.gov/pandemic-assistance/cfap>.

<sup>32</sup> See USDA, CFAP 2: Eligible and Ineligible Commodities (May 31, 2021), at <https://www.farmers.gov/cfap2/commodities>.

<sup>33</sup> See USDA, Coronavirus Food Assistance Program FAQ (CFAP FAQ), Frequently Asked Questions (May 31, 2021), at: <https://www.farmers.gov/cfap/faq>.

<sup>34</sup> See USDA, Apply for Coronavirus Food Assistance Program 2 (May 31, 2021), at: <https://www.farmers.gov/cfap/apply>.

<sup>35</sup> At present, the USDA CFAP 2 Eligible Commodities Finder is not on the USDA website.

<sup>36</sup> CFAP 2 Rule, 85 Fed. Reg. 59,376, 59,385 (September 22, 2020) (to be codified at 7.C.F.R. § 9.4(a)(2)); CFAP 2 Handbook, page 2-14, para. 21.B (April 14, 2021); USDA, CFAP FAQ, “When does the reopening of the CFAP 2 signup start and end?” (April 22, 2021); CFAP 2 Fact Sheet, at 1 (April 27, 2021).

<sup>37</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks) (January 19, 2021); CFAP 2 Handbook, page 2-14, para. 21.B (April 14, 2021).

Most recently, the CFAP 2 signup period was reopened on April 5, 2021 for all eligible farmers.<sup>38</sup> USDA says the new deadline to apply for CFAP 2 will be announced at a later date, but it will remain open for at least sixty days.<sup>39</sup>

## **B. New Commodities Now Eligible for CFAP 2**

For CFAP 2, new rules have added the following eligible commodities.<sup>40</sup>

### **1. Contract Farmers Now Eligible—Payments on Pause**

Contract producers of swine and poultry are now eligible for CFAP 2.<sup>41</sup> This means that contract producers of hogs, pigs, broilers, pullets, layers, chicken eggs, and turkeys may now apply for CFAP 2 assistance. However, USDA has put a pause on payments for contract producers “while the CFAP Program is under review.”<sup>42</sup> USDA says it will still accept CFAP 2 applications from contract producers, and that once a decision has been reached by USDA it will provide at least an additional thirty days for contract producers to sign up for the program.

### **2. Pullets Now Eligible**

Pullets are now eligible for CFAP 2 as a sales commodity and farmers can apply for CFAP 2 for pullets just as they would for any other eligible commodity.<sup>43</sup> They are considered “other livestock” by USDA.<sup>44</sup>

Because pullets were not an eligible commodity until recently, farmers who previously applied to CFAP 2 may modify their applications to include pullets.<sup>45</sup> To do so, USDA says farmers should contact their local USDA Service Center. Chapter Seven of this Guide describes modifying an existing application.

<sup>38</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, (March 23, 2021).

<sup>39</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, (March 23, 2021); USDA, CFAP FAQ, “When does the reopening of the CFAP 2 signup start and end?” (April 22, 2021); USDA, After Identifying Gaps in Previous Aid, USDA Announces ‘Pandemic Assistance for Producers’ to Distribute Resources More Equitably (March 24, 2021), at: <https://www.fsa.usda.gov/state-offices/Minnesota/news-releases/2021/after-identifying-gaps-in-previous-aid-usda-announces-pandemic-assistance-for-producers-to-distribute-resources-more-equitably>.

<sup>40</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks) (January 19, 2021).

<sup>41</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks) (January 19, 2021); CFAP 2 Handbook, page 2-14, para. 21.A, page 9-1, para. 300.A (April 14, 2021); USDA, CFAP FAQ, “Are contract livestock producers eligible for CFAP?” (April 22, 2021); USDA, CFAP 2 Fact Sheet, at 1-2 (April 27, 2021).

<sup>42</sup> USDA, CFAP FAQ, “Are contract livestock producers eligible for CFAP?” (April 22, 2021).

<sup>43</sup> CFAP 2 Handbook, page 2-14, para. 21.B, page 2-15, para. 22.A, page 3-3, para. 50.C, page 3-7, para. 51.E, page 7-21, para. 221.A (April 14, 2021); USDA, CFAP FAQ, “What commodities and livestock are eligible for CFAP 2?” (April 22, 2021).

<sup>44</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7. C.F.R. § 9.201) (January 19, 2021); CFAP 2 Handbook, page 7-21, para. 221.A (April 14, 2021).

<sup>45</sup> USDA, CFAP FAQ, “I applied for CFAP 2, but I also raise pullets or grow turfgrass sod. Do I submit a new application or modify an existing one for payments on those newly eligible commodities?” (April 22, 2021).

### 3. Turfgrass Sod Now Eligible

Turfgrass sod is now eligible for CFAP 2 as a sales commodity and farmers can apply for CFAP 2 for turfgrass sod just as they would for any other eligible commodity.<sup>46</sup>

Because turfgrass sod was not an eligible commodity until recently, farmers who previously applied to CFAP 2 may modify their applications to include turfgrass sod.<sup>47</sup> To do so, USDA says farmers should contact their local USDA Service Center. Chapter Seven of this Guide describes modifying an existing application.

#### C. CFAP 2 Sales Commodities Calculation Changes

The calculation for CFAP 2 benefits for sales crops has changed in a way that likely benefits a number of farmers.<sup>48</sup> This is helpful because benefits are based in part on the amount of those sales. Income can now be added to 2019 crop sales from: (1) federal crop insurance indemnities; (2) Noninsured Crop Disaster Assistance Program (NAP) payments, and (3) Wildfire and Hurricanes Indemnity Program Plus (WHIP+) payments.<sup>49</sup> Farmers can amend already submitted CFAP 2 applications to include additional income in their listed 2019 crop year sales.<sup>50</sup> Chapter Seven of this Guide describes modifying an existing application.

#### D. CFAP 2 Price Trigger Crop Yield Calculation Change

For price trigger crops, the rules have been changed for yield calculations, which are part of the basis for calculating price trigger crop benefits.<sup>51</sup> This change applies to the calculation of approved yields for farmers who had crop insurance but did not have an available 2020 APH approved yield.<sup>52</sup> Now, some farmers without a 2020 APH-approved yield can use 100 percent of the weighted 2019 Agriculture Risk Coverage-County Option

<sup>46</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7. C.F.R. § 9.201) (January 19, 2021); CFAP 2 Handbook, page 2-13, para. 21.A, page 3-7, para. 51.E, page 7-22, para. 221.A (April 14, 2021); USDA, CFAP FAQ, "What commodities and livestock are eligible for CFAP 2?" (April 22, 2021).

<sup>47</sup> USDA, CFAP FAQ, "I applied for CFAP 2, but I also raise pullets or grow turfgrass sod. Do I submit a new application or modify an existing one for payments on those newly eligible commodities?" (April 22, 2021).

<sup>48</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877 (prefatory remarks) (January 19, 2021). USDA says this was done to implement the 2021 Appropriations Act.

<sup>49</sup> CFAP 2 Handbook, page 2-14, para. 21B, page 2-16, para. 22.A, page 3-8, para. 52.B (April 14, 2021); USDA, CFAP FAQ, "I grow or raise a CFAP 2 sales-based commodity that suffered a loss covered by crop insurance indemnity, NAP, or WHIP+ in crop year 2019. I applied for CFAP 2, and my payment calculation only included eligible sales. Can I revise my application to update how the payment is calculated?" (April 22, 2021).

<sup>50</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7. C.F.R. § 9.203(i)(1) (January 19, 2021); CFAP 2 Handbook, page 2-14, para. 21.B, page 3-8, para. 52.B (April 14, 2021).

<sup>51</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4877 (prefatory remarks) (January 19, 2021).

<sup>52</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, page 3 (March 23, 2021); USDA, Apply for CFAP 2, Modify Existing CFAP 2 Application (May 31, 2021).

(ARC-CO) benchmark yield, instead of 85 percent, when calculating their CFAP payment.<sup>53</sup> These changes are discussed in more detail in Chapter Four of this Guide.

Farmers can amend already-submitted applications to include these changes. Chapter Seven of this Guide describes modifying an existing application.

### **E. CFAP 2 Additional Payments for Price Trigger Crops and Flat-Rate Crops**

In accordance with the 2021 Appropriations Act, USDA is providing additional payments of twenty dollars per acre for farmers who raise eligible price trigger or flat-rate crops.<sup>54</sup> USDA sometimes calls these payments “top-up” payments.<sup>55</sup> The payments are based on the farmer’s eligible 2020 acres.

Any farmer who applies for CFAP 2 for the first time will receive the top-up payments for price trigger crops and flat-rate crops in addition to the standard CFAP 2 payment.<sup>56</sup>

USDA says that any farmers who previously applied for and received a CFAP 2 payment for flat-rate crops or price trigger crops do not need to do anything in order to receive the top-up payment—those payments should be automatically made to eligible farmers.<sup>57</sup>

## **V. Guide Current Through May 31, 2021**

This Guide to CFAP 2, Second Edition, is current through May 31, 2021. If USDA makes changes to the program, FLAG may issue a new edition of this Guide.

## **VI. What This Guide Covers**

The following chapters explain the eligibility rules for CFAP 2, both for farmers and for the commodities. It then looks at how farmers apply for CFAP 2, how payments are made, the rules for farmer documentation for a CFAP 2 application, appeal rights, addressing discrimination, and other issues.

<sup>53</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(a)(3)) (January 19, 2021). For an explanation of the logic of this change, see CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021). For the previous rule, see CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(a)(3)).

<sup>54</sup> 2021 Appropriations Act § 751 (December 27, 2020).

<sup>55</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, page 2 (March 23, 2021).

<sup>56</sup> USDA, CFAP FAQ, “I did not apply for CFAP 2, but I raise row crops that fall under the price-trigger or flat-rate crop category. Am I now eligible and do I get the additional payment?” (April 22, 2021).

<sup>57</sup> USDA, CFAP FAQ, “I applied for CFAP 2 and received payments for my flat-rate and price-trigger crops. Do I need to do anything to receive the \$20/acre payment?” (April 22, 2021).

## Chapter Two: Farmer Eligibility for CFAP 2

To receive CFAP 2 funds a farmer must meet USDA eligibility requirements. The following sections explain these requirements.

### I. Farmer Must be an Eligible Producer

To be eligible for CFAP 2, the farmer must be what USDA calls an eligible producer.<sup>58</sup> In order for a farmer to be considered an eligible producer, the following rules must be followed.

#### A. Person or Legal Entity

An eligible producer can be a natural person.<sup>59</sup> An eligible producer can also be a legal entity.

##### 1. Eligible Persons

An individual farmer must have a certain immigration or citizenship status to qualify as an eligible producer for CFAP 2. An eligible person can be a United States citizen, a resident alien, or what USDA calls a foreign person.

##### a. U.S. Citizen

An individual farmer can be an eligible producer if the farmer is a United States citizen.<sup>60</sup>

##### b. Resident Alien

If the farmer is a person, the farmer can be an eligible producer if the farmer is a resident alien.<sup>61</sup> In general, that means a person must have a valid Form I-551

<sup>58</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3); CFAP 2 Handbook, page 2-1, para. 15.A, Exhibit 2, page 4, "Producer" (April 14, 2021).

<sup>59</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Producer"); CFAP 2 Handbook, page 2-1, para. 15.A (April 14, 2021). For the purposes of CFAP 2, USDA seems to consider a "person" to be a natural person, and not an entity such as a corporation or partnership.

<sup>60</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3); CFAP 2 Handbook, page 2-2, para. 15.A (April 14, 2021); USDA, CFAP FAQ, "Who is eligible to participate in the Coronavirus Food Assistance Program 2?" (April 22, 2021).

<sup>61</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3); CFAP 2 Handbook, page 2-2, para. 15.A (April 14, 2021). For the purposes of CFAP 2, a resident alien is a "lawful alien," as defined in 7 C.F.R. § 1400.3(b) (2020). See CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3(b)(2)).

card.<sup>62</sup> These are commonly called Green Cards, though officially they are called Permanent Resident Cards.<sup>63</sup>

### **c. Foreign Person**

A foreign person may be an eligible producer under CFAP rules.<sup>64</sup>

For the purposes of CFAP 2, a foreign person is defined in USDA rules and has two parts.<sup>65</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>66</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>67</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 2.

First, a farmer that is a foreign person under FSA rules must provide a substantial amount of active personal labor for the farm.<sup>68</sup> Active personal labor is defined by FSA, and means to personally provide physical activities needed for a farming operation.<sup>69</sup> 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 CFAP 1 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

<sup>62</sup> CFAP 2 Handbook, page 2-2, para. 15.A (April 14, 2021).

<sup>63</sup> USDA rules sometimes refer to Form I-551 as a Resident Alien Card. CFAP 2 Handbook, page 2-2, para. 15.A (April 14, 2021). 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>.

<sup>64</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3(b)(6)); CFAP 2 Handbook, page 2-2, para. 15.A (April 14, 2021); 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>65</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Foreign person”); FSA Payment Eligibility Handbook, 5-PL, page 3-2, para. 154.A, Exhibit 2, page 5, “Foreign Person” (October 2, 2019); 7 C.F.R. § 1400.401(a) (2020).

<sup>66</sup> Sometimes the Form I-551 is referred to as a Resident Alien Card. 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>67</sup> FSA Payment Eligibility Handbook, 5-PL, page 3-6.5, para. 155.5.A, page 3-7, para. 156.B (October 2, 2019); 7 C.F.R. § 1400.401(b) (2020).

<sup>68</sup> CFAP 1 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); 7 C.F.R. § 1400.401(b) (2020); USDA, Coronavirus Food Assistance Program 2, Fact Sheet, at 1 (April 27, 2021).

<sup>69</sup> 7 C.F.R. § 1400.3(b), “Active personal labor” (2020); FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 1, “Active Personal Labor” (October 2, 2019). This includes land preparation, cultivating, harvesting, and marketing the commodities from the farm. Active personal labor also includes physical activity needed in a livestock operation.



this rule.<sup>70</sup> 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.<sup>71</sup> As of now, it is unclear which standard USDA will apply to foreign persons seeking eligibility for CFAP 2.

Second, a farmer that is a foreign person under FSA rules must provide capital for the farm.<sup>72</sup> Capital, for this purpose, is defined by FSA.<sup>73</sup> In general, capital means the funding provided to the farming operation in order to conduct farming activities.<sup>74</sup> 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>75</sup> The land can be leased by the foreign person.<sup>76</sup>

When filling out forms for CFAP 2, the farmer will be asked about immigration status and for a tax identification number.<sup>77</sup> There seems to be no legal barrier to participating in CFAP 2 based solely on immigration status.

## 2. Eligible Legal Entities

A number of legal entities can be eligible producers for CFAP 2.

<sup>70</sup> See CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments). The definition of active personal management can be found at 7 C.F.R. § 1400.3(b), “Active personal management” (2020).

<sup>71</sup> The existing regulations state that a substantial amount of active personal labor can be met by working the lesser of either 1000 hours in a calendar year or 50 percent of the total hours needed to conduct a farming operation that is comparable in size to the person’s share in the farming operation. See 7 C.F.R. § 1400.3(b), “Substantial amount of active personal labor” (2020).

<sup>72</sup> CFAP 1 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); USDA, CFAP 2 Fact Sheet, at 1 (April 27, 2021); USDA, Coronavirus Food Assistance Program 2, About Coronavirus Food Assistance Program 2, Eligible Producers (May 31, 2021).

<sup>73</sup> 7 C.F.R. § 1400.3(b), “Capital” (2020); FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 1, “Capital” (October 2, 2019).

<sup>74</sup> 7 C.F.R. § 1400.3(b), “Capital” (2020). Capital must be a direct out of pocket or borrowed input for the farm. The capital must come from a fund or account that is separate from anyone else involved in the operation. The input may not include advance program payments.

<sup>75</sup> CFAP 1 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); USDA, CFAP 2 Fact Sheet, at 1 (April 27, 2021).

<sup>76</sup> 7 C.F.R. § 1400.3(b), “Land” (2020). The land can be leased from another person with a legal interest in the farm if it is leased at fair market value.

<sup>77</sup> For example, Form CCC-902 (a required form when applying for CFAP 2), asks for tax identification number and citizenship status. See CFAP 2 Handbook, page 2-12, para. 19.A (April 14, 2021). 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>.

### ***a. Partnership***

A partnership can be an eligible producer.<sup>78</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>79</sup>

### ***b. Tribe or Tribal Organization***

An eligible producer can be an Indian Tribe or a Tribal organization.<sup>80</sup>

### ***c. Corporation and Limited Liability Company (LLC)***

An eligible producer can be a corporation as well as a limited liability company (LLC).<sup>81</sup>

### ***d. Cooperatives***

An eligible producer, according to FSA, can include some other organizational structures that are organized under state law.<sup>82</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 2. The rules do not say directly that a cooperative could be eligible. In general, it will be the farmer member of an agricultural cooperative that will be eligible for CFAP 2.<sup>83</sup>

<sup>78</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3(b)(3)); CFAP 2 Handbook, page 2-2, para. 15.A (April 14, 2021).

<sup>79</sup> See CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1)).

<sup>80</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3(b)(5)); CFAP 2 Handbook, page 2-2, para. 15.A (January 15, 2021). Indian tribe and a tribal organization, for this purpose, are 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. A tribal organization is generally 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>81</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3(b)(4)); CFAP 2 Handbook, page 2-2, para. 15.A (April 14, 2021).

<sup>82</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3(b)(4)); CFAP 2 Handbook, page 2-2, para. 15.A (April 14, 2021).

<sup>83</sup> USDA says that a farmer member of a marketing cooperative should apply as the producer, and the marketing cooperatives should not apply. USDA, CFAP FAQ, "Should a marketing cooperative apply, or should each grower apply separately?" (April 22, 2021).



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>84</sup> The vast majority of farm cooperatives are organized under state law.<sup>85</sup>

The challenge for a cooperative that wants to apply for CFAP 2 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>86</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 2. 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 2 are concerned, nothing outright stops a cooperative from being eligible for CFAP 2. 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 2.<sup>87</sup> Others will not be eligible.

But even if a cooperative, as an entity, is not eligible for CFAP 2, it is worth noting that the farmer members of the cooperative can be eligible for CFAP 2 no matter what the character of the cooperative.<sup>88</sup>

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<sup>84</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3(b)(4)); CFAP 2 Handbook, page 2-2, para. 15.A (April 14, 2021).

<sup>85</sup> See, for example, Roger A. McEowen, *Agricultural Law in a Nutshell*, 343-344 (2017).

<sup>86</sup> For a brief legal summary, see McEowen, at 343-346.

<sup>87</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>88</sup> See, for example, USDA, CFAP FAQ, “Should a marketing cooperative apply, or should each grower apply separately?” (April 22, 2021).

### ***e. Foreign Entity***

A foreign entity can be an eligible producer for CFAP 2.<sup>89</sup>

For the purpose of CFAP 2 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>90</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>91</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 2 as a foreign entity, it appears that 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>92</sup> To provide active personal labor means to provide physical activities needed for a farming operation.<sup>93</sup>

<sup>89</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.3(b)(6)); USDA, CFAP 2 Fact Sheet, at 1 (April 27, 2021); USDA, Coronavirus Food Assistance Program 2, About Coronavirus Food Assistance Program 2, Eligible Producers, CFAP Eligibility (May 31, 2021). Foreign entity eligibility is controlled by FSA Payment Eligibility Handbook, 5-PL (October 2, 2019) and 7 C.F.R. part 1400 (2020).

<sup>90</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Foreign entity”); FSA Payment Eligibility Handbook, 5-PL, page 3-5, para. 155.A, Exhibit 2, page 5 “Foreign Entity”; 7 C.F.R. § 1400.401(b)(1) (2020).

<sup>91</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); 7 C.F.R. 1400.401(b)(1)-(5) (2020). The calculation is based on the higher of either the percent of beneficial interest at the time the CFAP agreement is signed or executed, or the beginning harvest date for the commodity. 7 C.F.R. 1400.401(b)(1)-(5) (2020). FSA notes that all interest in an entity, including an interest in an embedded entity, are taken into account. FSA Payment Eligibility Handbook, 5-PL, page 3-5, para. 155.B (October 2, 2019). An embedded entity is defined in FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 4, “Embedded legal entity” (October 2, 2019). FSA rules also say that in some cases FSA may decide that an ownership interest of 10 percent or less may still count as a beneficial interest. FSA Payment Eligibility Handbook, 5-PL, page 3-6, para. 155.D (October 2, 2019). The rules do not say how or why that determination might be made. If the entity later increases in foreign ownership percentage, the entity must inform FSA. FSA Payment Eligibility Handbook, 5-PL, page 3-6, para. 155.E (October 2, 2019). General FSA rules say that in this case the entity may be required to refund the payment. If an entity does not meet the requirements of the foreign entity rule, payment may be reduced and not completely denied.

<sup>92</sup> CFAP 1 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); 7 C.F.R. § 1400.401(b)(2) (2020).

<sup>93</sup> 7 C.F.R. § 1400.3(b), “Active personal labor” (2020); FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 1, “Active Personal Labor” (October 2, 2019). This includes land preparation,

If an entity is owned in whole or in part by a foreign person, it appears the entity will only be eligible for a CFAP 2 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>94</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.

## **B. Share in Risk of Producing Commodity**

In order to be an eligible producer a farmer must share in the risk of producing the commodity.<sup>95</sup>

## **C. Ownership Interest—Except Contract Producers**

In general, the farmer must have an ownership interest in the commodity that is eligible.<sup>96</sup> Ownership, for this purpose does, not mean that the farmer owns farmland where the commodity is produced.<sup>97</sup> It means, instead, that the farmer owns the commodity, and has both control of the commodity and title to the commodity.

To be eligible as a contract producer, however, the farmer must not have an ownership interest in the commodity.<sup>98</sup>

## **D. Still in the Business of Farming**

In order to be an eligible producer for CFAP 2, the applicant must still be in the business of farming at the time the farmer applies for CFAP 2.<sup>99</sup>

# **II. Additional Farmer Eligibility Requirements**

In order to be considered eligible producers under CFAP 2, farmers must also comply with the following rules.

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cultivating, harvesting, and marketing the commodities from the farm. Active personal labor also includes physical activity needed in a livestock operation.

<sup>94</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments).

<sup>95</sup> CFAP 2 Rule, 85 Fed. Reg. 59,384, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Producer"); CFAP 2 Handbook, page 2-1, para. 15.A, page 5-31, para. 136.A, page 6-21, para. 176.A, Exhibit 2, page 4, "Producer" (April 14, 2021); USDA, CFAP FAQ, "Who is eligible to participate in the Coronavirus Food Assistance Program 2?" (April 22, 2021). This aspect of eligibility is quite different from CFAP 1 eligibility.

<sup>96</sup> CFAP 2 Handbook, pages 2-13 and 2-14, para. 21.A-B (April 14, 2021).

<sup>97</sup> CFAP 2 Handbook, page 2-51, para. 36.A (April 14, 2021).

<sup>98</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, "Contract producer") (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, page 9-21, para. 311.A (April 14, 2021).

<sup>99</sup> CFAP 2 Rule, 85 Fed. Reg. 59,389, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Producer"); CFAP 2 Handbook, page 2-1, para. 15.A, page 3-2, para. 50.B, page 5-31, para. 136.A, page 6-21, para. 176.A, Exhibit 2, page 4, "Producer" (April 14, 2021); CFAP 2 Application, AD-3117, Part A(2) (January 19, 2021); USDA, CFAP FAQ, "Who is eligible to participate in the Coronavirus Food Assistance Program 2?" (April 22, 2021).

## A. Conservation Compliance

A farmer applying for CFAP 2 must meet what are known as conservation compliance requirements.<sup>100</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>101</sup>

The farmer will need to certify conservation compliance when applying for CFAP 2.<sup>102</sup> This requirement, which will be new for farmers that have not worked with USDA in the past, is discussed in more detail below.

## B. Compliance with Adjusted Gross Income (AGI) Limitation

USDA programs sometimes condition eligibility on what are known as adjusted gross income (AGI) limitations.<sup>103</sup> These AGI limits seem to apply to CFAP 2.<sup>104</sup>

USDA provides an explanation of how the AGI rule works.<sup>105</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>106</sup> For joint ventures and partnerships, the average AGI limitation is applied to each member of the business.

<sup>100</sup> CFAP 2 Rule, 85 Fed. Reg. 59,389, 59,382 (September 22, 2020) (prefatory comments); CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); CFAP 2 Handbook, page 2-2, para. 15.B, pages 2-10 and 2-11, para. 18.A (April 14, 2021); USDA, CFAP FAQ, “Do the Farm Bill’s conservation compliance requirements apply to CFAP?” (April 22, 2021); Additional rules for conservation compliance that eligible producers must follow can be found at 7 C.F.R. part 12 (2020).

<sup>101</sup> 7 C.F.R. § 12.1(a) (2020).

<sup>102</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)); CFAP 2 Handbook, pages 2-10 and 2-11, para. 18.A (April 14, 2021).

<sup>103</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>104</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,835 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(d)); CFAP 2 Handbook, page 2-2, para. 15.B, page 2-9, para. 17.A (April 14, 2021); USDA, CFAP FAQ, “Is there an Adjusted Gross Income (AGI) limit to receive CFAP assistance?”, “Who must fill out forms to certify average AGI and Farm AGI?” (April 22, 2021). 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>105</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,827 (May 21, 2020) (prefatory comments); see also CFAP 2 Handbook, page 2-9, para. 17.A (April 14, 2021).

<sup>106</sup> This number is for the 2020 program year. The average to be used comes from tax years 2016, 2017, and 2018. CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(d)); CFAP 2 Handbook, page 2-9, para. 17.A (April 14, 2021); USDA, CFAP FAQ, “Is there an Adjusted Gross Income (AGI) limit to receive CFAP assistance?” (April 22, 2021).

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>107</sup>

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

To be eligible for a CFAP 2 payment, a farmer must comply with certain controlled substance rules.<sup>108</sup> This means that a person that is convicted of a controlled substance violation will be ineligible, at least for a time, for CFAP 2.<sup>109</sup> In particular, the conviction cannot be for planting, cultivating, growing, producing, harvesting, or storing a controlled substance.<sup>110</sup> As of 2018, with the passing of the Agriculture Improvement Act of 2018 (commonly known as the 2018 Farm Bill), some hemp production will not trigger this restriction because hemp is no longer classified as a Schedule I controlled substance.<sup>111</sup>

### **D. Not Need to Have Worked with USDA in the Past**

There is no requirement for a farmer to have worked with USDA in any way in the past.<sup>112</sup>

### **E. Acreage Reports**

Some farmers—but not all—will need to file what USDA calls an acreage report (Form FSA-578). Acreage reports must be filed by farmers who apply for CFAP 2 benefits for a price trigger crop or flat-rate crop.<sup>113</sup> Somewhat confusingly, USDA sometimes calls these commodities acreage-based crops.

Farmers who apply for sales commodities, or those who apply for a price trigger commodity that is not a price trigger crop, do not need to complete the acreage report.

<sup>107</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(d)); CFAP 2 Handbook, page 2-9, para. 17.A (April 14, 2021); Notice PL-289, CFAP AGI Certifications, page 1, para. 1.A (June 1, 2020).

<sup>108</sup> CFAP 2 Handbook, page 2-11, para. 18.B (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 1 (April 27, 2021).

<sup>109</sup> 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 2 Handbook, page 2-11, para. 18.B (April 14, 2021). 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 2 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>110</sup> 7 C.F.R. § 718.6(b) (2020).

<sup>111</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>112</sup> USDA, CFAP FAQ, "I don't participate in any USDA programs. Can I apply for CFAP 2?" (April 22, 2021).

<sup>113</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. 9.4(d)); CFAP 2 Handbook, page 8-4, para. 251.A (April 14, 2021); USDA, CFAP FAQ, "What if I don't have a 2020 FSA-578 crop acreage report on file with FSA?" (April 22, 2021).

For many farmers this will be the first time the farmer files an acreage report with USDA. In general, USDA has a set of rules for filing an acreage report.<sup>114</sup> For the purpose of applying for CFAP 2, however, a number of those rules will not apply.<sup>115</sup> For example, a CFAP 2 farmer can fill in the form later than would normally be allowed will not be charged a late fee, USDA will not need to do a farm visit, there will be no farm visit and crop certification fees, and USDA will not need to certify the crop.

#### **F. Bankruptcy Does Not Affect Eligibility**

CFAP 2 eligibility is not affected if the farmer has filed a bankruptcy petition.<sup>116</sup>

### **III. Additional Requirements for Contract Producers**

Recent changes to the rules now allow certain contract producers to be eligible for CFAP 2.<sup>117</sup> In addition to meeting the definition of an eligible producer, described above, contract producers must satisfy the following requirements as well.

#### **A. Contract Producer Definition**

In order to qualify as a contract producer for purposes of CFAP 2, a farmer must first meet the USDA definition of a contract producer.<sup>118</sup> This definition has three parts.

##### **1. Produced Under Contract**

In order to be a contract producer, the farmer must produce the commodity under a contract for, or on behalf of, another person or legal entity.<sup>119</sup>

<sup>114</sup> The general rules for acreage reports can be found at FSA Handbook, Acreage and Compliance Determinations, 2-CP (Revision 16) (September 8, 2020).

<sup>115</sup> CFAP 2 Handbook, page 8-5, para. 251.D (April 14, 2021); USDA, CFAP FAQ, "What if I don't have a 2020 FSA-578 crop acreage report on file with FSA?" (April 22, 2021).

<sup>116</sup> CFAP 2 Handbook, page 3-24, para. 65.F (April 14, 2021).

<sup>117</sup> USDA says the following about the reason for the change. First, USDA did not include contract producers under CFAP 1 because USDA believed that the impacts of COVID-19 on contract farmers was not well known at the time. Second, the harm caused by delayed delivery of young poultry and hogs to contract producers, decreased housing densities, increased costs for keeping animals longer than normal, and damage caused by keeping animals too large for the housing on the farm were known to USDA when it issued rules for CFAP 2. USDA describes these losses in some detail. USDA, however, believed that the authority under the CCC Charter did not allow payments to farmers that did not market their contract production. Now, however, CARES Act funding, which does allow such assistance, is available. See CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks) (January 19, 2021).

<sup>118</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F. R. § 9.201, "Contract producer") (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A (April 14, 2021).

<sup>119</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, "Contract producer") (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, page 9-1, para. 300.A, page 9-21, para. 311, Exhibit 2, page 1, "Contract producer" (April 14, 2021).

## **2. No Ownership of Commodity**

To be an eligible contract producer, the farmer must not have an ownership interest in the commodity.<sup>120</sup>

## **3. Not Entitled to Share of Proceeds**

To be a contract producer, the farmer must not have the right to a share in the sale proceeds of the commodity.<sup>121</sup>

## **B. Eligible Commodities of Contract Producers: Swine or Poultry**

For a contract producer to be eligible under CFAP 2, the farmer must grow or raise what USDA counts as an “eligible commodity.”<sup>122</sup> Contract farmers can be eligible if they produced hogs or poultry under contract. No other commodities are eligible. The following sections discuss this requirement in more detail.

### **1. Swine**

Swine are an eligible commodity for CFAP 2 contract producers. By swine, USDA means hogs and pigs.<sup>123</sup> Hogs are defined as any swine weighing 120 pounds or more. Pigs are defined as swine weighing less than 120 pounds.

### **2. Poultry**

Poultry are an eligible commodity for CFAP 2 contract producers. By poultry, USDA means chickens, chicken eggs, and turkeys.<sup>124</sup> Chickens include broilers, pullets, and layers.<sup>125</sup> Broilers are defined as any chicken that is commercially produced for meat purposes, has not been used for laying or breeding purposes, and left the farm for slaughter.<sup>126</sup> By layer, USDA means a chicken that produces table or commercial type

<sup>120</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, “Contract producer”) (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, page 2-15, para. 22.A, page 9-21, para. 311.A (April 14, 2021).

<sup>121</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, “Contract producer”) (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, page 9-21, para. 311.A (April 14, 2021).

<sup>122</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. §§ 9.201, “Contract producer,” 9.202(b)(1)) (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, page 9-1, para. 300.A, page 9-21, para. 311.A (April 14, 2021); USDA, CFAP FAQ, “Are contract livestock producers eligible for CFAP?” (April 22, 2021); USDA, CFAP 2 Fact Sheet, at 1-2 (April 27, 2021).

<sup>123</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.202((b)(1)) (January 19, 2021); CFAP 2 Handbook, page 2-14, para. 21.A, page 9-1, para. 300.B, Exhibit 2, page 3-4, “Hogs,” “Pigs” (April 14, 2021).

<sup>124</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.202((b)(1)) (January 19, 2021); CFAP 2 Handbook, page 9-1, para. 300.B, page 9-21, para. 311.A (January 15, 2020).

<sup>125</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.202(b)(1)) (January 19, 2021); CFAP 2 Handbook, page 2-14, para. 21.A, page 2-51, para. 35.A, page 9-1, para. 300.B, page 9-21, para. 311.A (April 14, 2021).

<sup>126</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (to be codified at 7 C.F.R. § 9.201, “Broilers”) (September 22, 2020); CFAP 2 Handbook, Exhibit 2, page 1, “Broilers” (April 14, 2021).

shell eggs.<sup>127</sup> By pullet, USDA means a young female chicken that has not laid an egg.<sup>128</sup> By chicken eggs, USDA means shell, dried, frozen, or liquid eggs.<sup>129</sup>

### **C. Under Contract in Both 2019 and 2020**

In order for a contract producer to be eligible for CFAP 2, the farmer must have produced an eligible commodity under contract in both calendar year 2019 and calendar year 2020.<sup>130</sup> As a result, new contract producers in 2020 are not eligible.

USDA provides the following example.

If a farmer who raises chickens under a production contract, and the chickens are owned by a company that produces chicken products, the farmer can be eligible under any of the following circumstances: (1) the farmer does not receive payment for chickens that die before reaching maturity; (2) the farmer does not receive payment when young animals are not supplied to the farmer by the company; or (3) the farmer does not receive a normal payment even if there are fewer young animals than normal are provided by the company.<sup>131</sup>

This seems to mean that a contract grower is not eligible if under the contract the farmer receives payment if chickens die before maturity.<sup>132</sup> In addition, the contract grower would not be eligible if the contract said that the farmer would still get paid if young animals are not supplied by the company. Further, the farmer would not be eligible if the contract said the farmer's income is not reduced if fewer young animals than normal are supplied by the company.

The rules seem to be trying to ensure that if a contract farmer gets paid a normal amount even if the bird dies, or fewer young animals are provided than normal, that farmer is not eligible.

### **D. Revenue from Contract**

The farmer must have received revenue under the 2019 or 2020 contract at some point during the period of January 1, 2020, through December 27, 2020.<sup>133</sup> Revenue received from December 28, 2020, through December 31, 2020, is not relevant for this purpose.

<sup>127</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.201, "Layers") (January 19, 2021); CFAP 2 Handbook, Exhibit 2, page 3, "Layer" (April 14, 2021).

<sup>128</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.201, "Pullet") (January 19, 2021); CFAP 2 Handbook, Exhibit 2, page 5, "Pullet" (April 14, 2021).

<sup>129</sup> CFAP 2 Handbook, page 9-1, para. 300.B, Exhibit 2, page 2, "Eggs" (April 14, 2021).

<sup>130</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.202(b)(1) (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, page 9-1, para. 300.A, page 9-21, para. 311.A-B (April 14, 2021); USDA, CFAP FAQ, "Are contract livestock producers eligible for CFAP?" (April 22, 2021).

<sup>131</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks) (January 19, 2021).

<sup>132</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks) (January 19, 2021).

<sup>133</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.202(b)(1) (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, page 9-21, para. 311.A, 9-22, para. 312.B (April 14, 2021).



## **E. Had an Eligible Revenue Loss**

To be eligible for a payment, contract growers must have had what USDA calls a loss of eligible revenue.<sup>134</sup> The eligible revenue loss is calculated the following way.

### **1. Eligible Revenue Defined**

USDA defines eligible revenue for a contract farmer.<sup>135</sup> It is defined as the revenue the contract farmer received for contract production of an eligible commodity. The eligible commodity must be broilers, pullets, layers, chicken eggs, turkeys, hogs, or pigs. The revenue must be based on the revenue reported on the farmer's Internal Revenue Service (IRS) Form 1099.

Only revenue received between January 1 and December 27 of either 2019 or 2020 is considered eligible revenue.<sup>136</sup> Any revenue received between December 28 and December 31 of either 2019 or 2020 is not eligible revenue.

### **2. Eligible Revenue Loss Defined**

An eligible revenue loss is calculated by comparing the eligible revenue from January 1, 2020, to December 27, 2020, to the eligible revenue from January 1, 2019, to December 27, 2019.<sup>137</sup> In other words, in general, to be eligible for a payment a contract producer must have had less eligible revenue in 2020 than the farmer had in eligible revenue in 2019.

It appears, therefore, that even though the rules do not require a contract farmer to have received contract revenue in 2019, no payment will be allowed unless eligible revenue in the 2020 period is less than eligible revenue from the 2019 period. As a result, a contract farmer that had no eligible contract revenue in 2019 will not be eligible for a payment under the new rules.

## **IV. When Farmers are Not Eligible for CFAP 2**

USDA rules set out several types of farmers and farming operations that are not eligible for CFAP 2 payments. These are discussed below.

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<sup>134</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.202(b)(2)) (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, 2-14, para. 21.A, page 9-1, para. 300.A (April 14, 2021).

<sup>135</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, "Eligible revenue") (January 19, 2021); CFAP 2 Handbook, page 9-22, para. 312.B, Exhibit 2, page 2, "Eligible revenue" (April 14, 2021).

<sup>136</sup> CFAP 2 Handbook, page 9-22, para. 312.B (April 14, 2021).

<sup>137</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.202(b)(2)), 4883 (to be codified at 7 C.F.R. § 9.203(l)) (January 19, 2021); CFAP 2 Handbook, page 2-1, para 15.A, page 9-1, para. 300.A, page 9-21, para. 311.A-B, 9-22, para. 312.B, page 9-45, para. 326.A-B (April 14, 2021).

### **A. No Ownership Interest in Eligible Crop or Livestock—Except Contract Producers**

With the exception of contract producers, 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 2 payment.<sup>138</sup>

### **B. 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 2.<sup>139</sup> Suspended and debarred people are banned from a broad range of government programs.<sup>140</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>141</sup> Relatively few people will be affected by this restriction. It is not, for example, triggered by delinquency on FSA loans or loan forgiveness.

### **C. Public Schools**

Public schools are not eligible to receive payments under CFAP 2.<sup>142</sup> Public schools are defined under FSA rules.<sup>143</sup> A public school can be a primary, elementary, or secondary school. A public school can also be a college or university. To be defined as a public school, at least one of two things must be true. First, if the school is directly administered under the authority of a governmental body it counts as a public school. Second, if the school receives “a predominant amount of its financing” from public funds it is defined as a public school.<sup>144</sup> Predominant amount is not defined in FSA rules. A predominant amount probably means the majority.<sup>145</sup> These rules suggest that a private school could be an eligible producer under CFAP 2.

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 2 payments.

<sup>138</sup> CFAP 2 Handbook, page 2-2, para. 15.B (April 14, 2021).

<sup>139</sup> CFAP 2 Handbook, page 2-2, para. 15.B (April 14, 2021). The CFAP 2 Handbook incorporates 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>140</sup> A suspension is short term, debarment can last longer. For definitions, see 2 C.F. R. §§ 180.925, 180.1015 (2020). For timing, see 2 C.F.R. § 417.865 (2020).

<sup>141</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>142</sup> CFAP 2 Handbook, page 2-2, para. 15.B (April 14, 2021). The CFAP 2 Handbook incorporates the definitions in the FSA Payment Eligibility Handbook, 5-PL (October 2, 2019).

<sup>143</sup> FSA Payment Eligibility Handbook, 5-PL, Exhibit 2, page 7, “Public School” (October 2, 2019).

<sup>144</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>145</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).

## **D. Governments**

Federal, state, and local governments may not be eligible producers under CFAP 2.<sup>146</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 2 payments.

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<sup>146</sup> CFAP 2 Handbook, page 2-2, para. 15.B (April 14, 2021). The CFAP 2 Handbook incorporates the definitions in FSA Handbook, 5-PL, Payment Eligibility Handbook (October 2, 2019).

## Chapter Three: Commodity Eligibility

CFAP 2 payments are limited to certain eligible commodities. Both crops and livestock can be eligible commodities for purposes of CFAP 2.<sup>147</sup> The sections below describe what commodities can be eligible. They also describe the grouping of commodities that USDA has created and that helps decide how the payments will be figured. Some of the categories can be confusing, so it is important to check carefully to make sure the farmer's commodity fits the eligibility and grouping created by USDA. The USDA CFAP 2 website provides information on each type of eligible commodity.<sup>148</sup>

### I. Commodity Defined

For the purposes of CFAP 2 payments, an eligible commodity must meet the following four requirements.<sup>149</sup>

#### A. Produced in the United States

An eligible commodity must be produced in the United States.<sup>150</sup> Imported commodities, which are not used in calculating a CFAP payment, are not eligible.<sup>151</sup>

#### B. Intended to be Marketed for Commercial Production

In general, USDA rules say an eligible commodity must be intended to be marketed for commercial production.<sup>152</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.

<sup>147</sup> CFAP 2 Handbook, page 2-13, para. 21.A (April 14, 2021); USDA, CFAP FAQ, "What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?" (April 22, 2021).

<sup>148</sup> USDA, CFAP 2: Eligible and Ineligible Commodities (May 31, 2021). Previously, the USDA CFAP 2 website provided what it called a "CFAP 2 Eligible Commodities Finder." It is no longer available.

<sup>149</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, "Commodity"); CFAP 2 Handbook, Exhibit 2, page 1, "Commodity" (April 14, 2021).

<sup>150</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, "Commodity"); CFAP 2 Handbook, page 3-2, para. 50.B, page 6-21, para. 176.B, Exhibit 2, page 1, "Commodity" (April 14, 2021); CFAP 2 Application, AD-3117, Part A(4) (January 19, 2021).

<sup>151</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,830 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.1(a)).

<sup>152</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, "Commodity"); CFAP 2 Handbook, page 3-2, para. 50.B, page 6-21, para. 176.B, and Exhibit 2, page 1, "Commodity" (April 14, 2021); CFAP 2 Application, AD-3117, Part A(4) (January 19, 2021); USDA, Coronavirus Food Assistance Program, About Coronavirus Food Assistance Program, Eligible Producers (May 31, 2021).

### **C. Designated by USDA as Eligible for CFAP**

The definition of commodity requires that it be designated by USDA as eligible for payment under CFAP 2.<sup>153</sup> USDA has created lists of commodities that are currently eligible.<sup>154</sup> Some commodities raised by farmers in the United States are not included and therefore are not eligible for CFAP 2.

The commodities that are now eligible for CFAP 2 are listed and defined later in this Guide. There is also a discussion of if and how commodities might be added to the eligible commodity list.<sup>155</sup>

### **D. USDA Decides Commodity Eligibility**

The rules for CFAP 2 commodity eligibility are described below.

#### **1. USDA Created Lists of Eligible Commodities**

USDA determines the eligibility of commodities on a commodity-by-commodity basis. It makes these decisions on an across-the-board basis for each commodity. In other words, for each commodity—for example, corn—the commodity is either eligible for CFAP 2 or not eligible. That determination applies to every farmer that raises corn. It turns out that USDA decided corn is eligible for CFAP 2. On the other hand, USDA decided that some commodities—such as milkweed, clover, and vetch—are not eligible commodities. This means that for all producers in the country, milkweed, clover, and vetch are not eligible for CFAP 2.

#### **2. Some Commodities for Certain Not Eligible**

In a few cases USDA has said certain commodities are not eligible. Ineligible commodities are discussed later in this Chapter.

#### **3. Adding Commodities**

It is possible that other commodities could be added to the current CFAP 2 list.<sup>156</sup> Unlike CFAP 1, however, USDA did not create a process whereby farmers are encouraged to send in information that would get commodities added to the list of eligible CFAP 2 commodities or perhaps move them from one category to another.<sup>157</sup>

## **II. Four Categories of Eligible Commodities**

USDA initially created three main categories of eligible commodities for CFAP 2.<sup>158</sup> However, following changes to CFAP 2 made by the 2021 Appropriations Act, there is now a fourth

<sup>153</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Commodity”); CFAP 2 Handbook, Exhibit 2, page 1, “Commodity” (April 14, 2021).

<sup>154</sup> For a more exhaustive list of the CFAP 2 eligible commodities, see USDA, Coronavirus Food Assistance Program, Eligible Commodities (May 31, 2021).

<sup>155</sup> Previously, the USDA website had a CFAP 2 Eligible Commodities Finder that is no longer available.

<sup>156</sup> Specifically, USDA has said it could create eligibility for additional price trigger crops and flat-rate crops. See CFAP 2 Handbook, page 8-25, para. 261.A, page 8-51, para. 273.A (April 14, 2021).

<sup>157</sup> A USDA CFAP FAQ previously addressed this point directly, but that FAQ is no longer on the website.

<sup>158</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,380 (September 22, 2020) (prefatory remarks).

category of eligible commodities—commodities of contract producers.<sup>159</sup> Accordingly, there are now four categories of eligible commodities for CFAP 2: (1) price trigger commodities; (2) flat-rate commodities; (3) sales commodities; and (4) contract producer commodities.

The commodities within these groups often seem to have little in common with one another. The grouping matters a great deal, however, because it controls how the CFAP 2 payments will be calculated for that commodity. These categories, and the many different types of commodities included in each, are discussed in the following sections.

## **A. Price Trigger Commodities**

USDA refers to one group of eligible commodities as price trigger commodities.<sup>160</sup> It includes both crops and livestock. In general, this means that for each of these commodities there was at least a 5 percent price decline between the average price for January 13-17, 2000, on one hand, and the average price for the week of July 27-31, 2020, on the other.<sup>161</sup>

USDA divides price trigger commodities into two main categories: (1) price trigger livestock and livestock products, which includes dairy, eggs, broilers, and certain livestock; and (2) price trigger crops.<sup>162</sup>

### **1. Price Trigger Livestock and Livestock Products**

Various livestock and livestock products are eligible for CFAP 2 under the category of price trigger commodities.<sup>163</sup> These include: (1) dairy; (2) livestock, including beef cattle, hogs and pigs, and sheep and lambs; (3) eggs; and (4) broilers.<sup>164</sup>

#### **a. Dairy**

Dairy is an eligible price trigger commodity under CFAP 2.<sup>165</sup> By dairy, USDA means milk from a bovine.<sup>166</sup> In general, dairy payments in CFAP 2 are meant to

<sup>159</sup> The 2021 Appropriations Act refers to contract producers as “contract growers.” See Consolidated Appropriations Act, 2021, Division A, Title I, Subtitle B, Chapter 1, Section 751 (December 27, 2020).

<sup>160</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,380 (September 22, 2020) (prefatory remarks); CFAP 2 Handbook, Exhibit 2, page 4, “Price Trigger Commodities” (April 14, 2021).

<sup>161</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,380 (September 22, 2020) (prefatory remarks); CFAP 2 Handbook, page 5-1, para. 125.A, page 6-1, para. 165.B, page 8-71, para. 284.B (April 14, 2021); USDA, CFAP FAQ, “How did USDA determine which commodities were price trigger commodities?” (April 22, 2021).

<sup>162</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,380 (September 22, 2020) (prefatory remarks); CFAP 2 Handbook, Exhibit 2, page 4, “Price Trigger Commodities” (April 14, 2021); USDA, CFAP FAQ, “What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?” (April 22, 2021).

<sup>163</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Price trigger commodities”); USDA, CFAP FAQ, “How did USDA determine which commodities were price trigger commodities?” (April 22, 2021).

<sup>164</sup> CFAP 2 Handbook, Exhibit 2, page 4, “Price trigger livestock and products” (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 2 (April 27, 2021); USDA, CFAP FAQ, “How did USDA determine which commodities were price trigger commodities?” (April 22, 2021).

<sup>165</sup> CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22.B (April 14, 2021); USDA, CFAP FAQ, “How did USDA determine which commodities were price trigger commodities?” (April 22, 2021).

<sup>166</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Price trigger livestock and products”); CFAP 2 Handbook, page 4-31, para. 96.A (April 14, 2021);

help dairy farmers that had marketing channel disruptions from the coronavirus pandemic for the second, third, and fourth quarters of 2020.<sup>167</sup> Dumped milk is included in the farm's production.<sup>168</sup>

### **(i) Eligible Dairy Operations**

To be eligible, dairies must commercially market their milk.<sup>169</sup> For this category of CFAP 2 only bovine milk is eligible.<sup>170</sup> In addition, production must be in the United States.<sup>171</sup> Dairy farms must be in operation at the time they apply for CFAP 2.<sup>172</sup> If the farm is no longer producing milk at the time of signing up for CFAP 2, it is not eligible.<sup>173</sup>

### **(ii) Eligible Milk Production—Actual and Estimated**

For CFAP 2, eligible milk production includes both actual milk production and estimated future production.<sup>174</sup>

Actual production includes milk that is commercially marketed for April, May, June, July, and August of 2020.<sup>175</sup> It also includes milk that was dumped over the same period and not recorded on milk marketing statements.<sup>176</sup>

Estimated production includes milk that is expected to be produced for the months of September, October, November, and December of 2020.<sup>177</sup> Estimated production is calculated using the daily average of actual milk production multiplied by the number of commercial operating days in

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USDA, CFAP FAQ, "I grow a commodity classified as a price trigger commodity. How is my payment calculated?" (April 22, 2021).

<sup>167</sup> CFAP 2 Handbook, page 4-1, para. 85.A (April 14, 2021); USDA, CFAP FAQ, "What milk production is eligible for CFAP 2?" (April 22, 2021).

<sup>168</sup> CFAP 2 Handbook, page 2-15, para. 22.A, page 4-31, para. 96.B (April 14, 2021).

<sup>169</sup> CFAP 2 Handbook, page 4-31, para. 96.A (April 14, 2021); USDA, CFAP FAQ, "What milk production is eligible for CFAP 2?" (April 22, 2021).

<sup>170</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Price trigger livestock and products"); CFAP 2 Handbook, page 4-31, para. 96.A (April 14, 2021); USDA, CFAP FAQ, "I grow a commodity classified as a price trigger commodity. How is my payment calculated?" (April 22, 2021).

<sup>171</sup> CFAP 2 Handbook, page 4-31, para. 96.A (April 14, 2021).

<sup>172</sup> CFAP 2 Handbook, page 4-31, para. 96.A (April 14, 2021). The farmer must certify to this on the CFAP 2 application. CFAP 2 Handbook, page 3-2, para. 50.B (April 14, 2021); CFAP 2 Application, AD-3117, Part A(2) (January 19, 2021).

<sup>173</sup> CFAP 2 Handbook, page 4-31, para. 96.A (April 14, 2021).

<sup>174</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(g)); CFAP 2 Handbook, page 4-31, para. 96.B (April 14, 2021).

<sup>175</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(g)(1)(i)); CFAP 2 Handbook, page 4-31, para. 96.B (April 14, 2021); USDA, CFAP FAQ, "I grow a commodity classified as a price trigger commodity. How is my payment calculated?" (April 22, 2021).

<sup>176</sup> CFAP 2 Handbook, page 4-31, para. 96.B (April 14, 2021).

<sup>177</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(g)(1)(ii)); CFAP 2 Handbook, page 4-31, para. 96.B (April 14, 2021); USDA, CFAP FAQ, "I grow a commodity classified as a price trigger commodity. How is my payment calculated?" (April 22, 2021).

September through December. In general, that number will be 122—representing the 122 days between September 1 and December 31.<sup>178</sup> However, if a farm stops production before December 31, that number may be prorated.<sup>179</sup>

It appears from the rules that if the dairy farmer applies late in the sign-up, the farmer will still need to use estimated production of September through December even if the actual production for that period is then known.

### **(iii) Federal Dairy Programs Do Not Affect Eligibility**

A number of federal programs are designed to assist dairy farmers. These do not affect CFAP 2 eligibility.<sup>180</sup> This includes Dairy Margin Coverage, Dairy Revenue Protection, Livestock Gross Margin, and other dairy revenue insurance programs.

### **(iv) Dissolved Dairy Operations**

Special rules apply for dissolved dairy operations. In general, the dairy must be in operation at the time the farmer enrolls in CFAP 2.<sup>181</sup> A dairy operation that dissolves after signing up for CFAP 2 can be eligible for a reduced CFAP 2 payment.<sup>182</sup> The reduced payment will be based on actual production for April 1, 2020, through August 31, 2020, and the estimated production will be based on the number of days the farm produced milk after September 1, 2020.

### **(v) Joint Venture Dairy Operations**

If the dairy is a joint venture that does not have a tax identification number for the joint venture, the individual farmers must apply for CFAP 2.<sup>183</sup>

### **(vi) Seasonal Dairies**

Seasonal dairies are eligible for CFAP 2 but are subject to special rules.<sup>184</sup> A seasonal operation that stops producing milk for the year after signing up for CFAP 2 is eligible for a prorated CFAP 2 payment. The payment is based on production from April 1, 2020, through August 31, 2020, and for

<sup>178</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(g)(1)(ii)); CFAP 2 Handbook, page 4-61, para. 111.B (April 14, 2021); USDA, CFAP FAQ, “I grow a commodity classified as a price trigger commodity. How is my payment calculated?” (April 22, 2021).

<sup>179</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(g)(2)); CFAP 2 Handbook, page 4-32, para. 96.C (April 14, 2021); USDA, CFAP FAQ, “I grow a commodity classified as a price trigger commodity. How is my payment calculated?” (April 22, 2021).

<sup>180</sup> CFAP 2 Handbook, page 4-31, para. 96.B (April 14, 2021).

<sup>181</sup> CFAP 2 Handbook, page 4-31, para. 96.C (April 14, 2021).

<sup>182</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(g)(2)); CFAP 2 Handbook, page 4-32, para. 96.C (April 14, 2021).

<sup>183</sup> CFAP 2 Handbook, page 4-32, para. 96.D (April 14, 2021).

<sup>184</sup> CFAP 2 Handbook, page 4-32, para. 96.E (April 14, 2021).



the period after September 1, 2020 the payment will reflect the actual number of days the seasonal dairy was producing milk.

### **b. Eggs**

In general, eggs are an eligible price trigger commodity for CFAP 2.<sup>185</sup> It is also possible to raise eggs on contract. If so, the farmer can be eligible as a contract producer, and is not viewed as raising a price trigger commodity.<sup>186</sup> This section describes eggs as a price trigger commodity.

By eggs, USDA means shell eggs, dried eggs, liquid eggs, and frozen eggs produced for calendar year 2019.<sup>187</sup> If, however, an egg producer began farming in 2020, and did not have any production in 2019, that farmer will be eligible for CFAP 2 based on their 2020 egg production.<sup>188</sup>

In general, egg payments in CFAP 2 are meant to help egg farmers because USDA has decided that egg farmers experienced marketing channel disruptions, low prices, and significant marketing costs from the coronavirus pandemic.<sup>189</sup> USDA made this determination for all egg farmers nationwide, and therefore farmers are not required to independently show that they experienced a marketing channel disruption, low prices, or significant marketing costs for their eggs.

To be eligible, farmers must meet the general eligibility requirements for CFAP 2.<sup>190</sup> This means the farmers must be commercially marketing their eggs. In addition, farmers not in the business of farming at the time of the application are not eligible. The egg production must be in the United States.

As noted above, eggs produced by contract growers are not eligible as a price trigger commodity.<sup>191</sup> As with other commodities, farmers must share in the risk of egg production. In addition, farmers must have a risk in the egg sales.<sup>192</sup> Egg farmers that have a guaranteed price for egg production are not eligible.

<sup>185</sup> CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22.B, page 5-1, para. 125.A (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 2 (April 27, 2021); USDA, Coronavirus Food Assistance Program 2 for Broiler and Egg Producers (May 31, 2021), at <https://www.farmers.gov/cfap/broilers-eggs>.

<sup>186</sup> CFAP 2 Handbook, page 5-31, para. 136.A, page 9-1, para. 300.A-B (April 14, 2021).

<sup>187</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Eggs”); CFAP 2 Handbook, page 2-15, para. 22.A, page 5-1, para. 125.B, 5-31, para. 136.A, Exhibit 2, page 1, “Eggs” (April 14, 2021); USDA, CFAP FAQ, “What type of eggs are eligible under CFAP 2?” (April 22, 2021).

<sup>188</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(h)); CFAP 2 Handbook, page 5-31, para. 136.B (April 14, 2021).

<sup>189</sup> CFAP 2 Handbook, page 5-1, para. 125.A (April 14, 2021). In particular, USDA has decided that egg producers have experienced a 5 percent or more decline in prices in a comparison of prices between January 13-17, 2020, and July 27-31, 2020.

<sup>190</sup> CFAP 2 Handbook, page 5-31, para. 136.A (April 14, 2021).

<sup>191</sup> CFAP 2 Handbook, page 5-31, para. 136.A (April 14, 2021).

<sup>192</sup> CFAP 2 Handbook, page 5-31, para. 136.A (April 14, 2021). USDA rules say USDA will decide who bears the risk in egg sales.

### **c. Broilers**

Broilers can be an eligible price trigger commodity for CFAP 2.<sup>193</sup>

If a farmer raises broilers on contract, the farmer may be eligible as a contract producer, and is not viewed as raising a price trigger commodity.<sup>194</sup> This section describes broilers as a price trigger commodity.

Broilers are defined for the purposes of CFAP 2 to be any chicken that is commercially processed for meat purposes, has not been used for laying or breeding purposes, and left the farm for slaughter in calendar year 2019.<sup>195</sup> This appears to mean that any chicken still on the farm is not an eligible broiler for CFAP 2 purposes. It is also unclear if birds that were slaughtered and processed on farm are eligible. The definition seems to assume that there is no on-farm processing of chickens for commercial meat sales. If a broiler producer began farming in 2020, and did not have any production in 2019, that farmer will be eligible for CFAP 2 based on their 2020 production.<sup>196</sup>

In general, broiler payments in CFAP 2 are meant to help broiler farmers that had marketing channel disruptions, low prices, and significant marketing costs from the coronavirus pandemic.<sup>197</sup> USDA made this decision for all broiler farmers nationwide, and therefore each broiler farmer is not required to show that they experienced a marketing channel disruption, low prices, or significant marketing costs.

The general CFAP 2 eligibility rules also apply to broiler farmers. This means the farmers must be commercially marketing their broilers.<sup>198</sup> In addition, farmers not in the business of farming at the time of the application are not eligible. The broiler production must be in the United States.

As noted above, broilers produced by contract growers are not eligible as a price trigger commodity.<sup>199</sup> The broiler producers must be independent growers, and they must share in the risk of the broiler production.

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<sup>193</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Broilers”); CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22.B, page 5-1, para. 125.A (April 14, 2021); USDA, Coronavirus Food Assistance Program for Broiler and Egg Producers (may 31, 2021), at <https://www.farmers.gov/cfap/broilers-eggs>.

<sup>194</sup> CFAP 2 Handbook, page 5-31, para. 136.A, page 9-1, para. 300.A-B (April 14, 2021).

<sup>195</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Broilers”); CFAP 2 Handbook, page 5-31, para. 136.B, Exhibit 2, page 1, “Broiler” (April 14, 2021).

<sup>196</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(f)); CFAP 2 Handbook, page 5-31, para. 136.B (April 14, 2021).

<sup>197</sup> CFAP 2 Handbook, page 5-1, para. 125.A (April 14, 2021). In particular, USDA has decided that broiler producers have experienced a 5 percent or more decline in prices in a comparison of prices between January 13-17, 2020, and July 27-31, 2020.

<sup>198</sup> CFAP 2 Handbook, page 5-31, para. 136.A (April 14, 2021).

<sup>199</sup> CFAP 2 Handbook, page 5-31, para. 136.A (April 14, 2021).

#### ***d. Price Trigger Livestock***

Livestock are eligible as a price trigger commodity for CFAP 2.<sup>200</sup> According to USDA, price trigger livestock are eligible for CFAP 2 due to market disruptions, low prices, and significant marketing costs associated with COVID-19.<sup>201</sup> In general, payments are based on the farmer's inventory on a date that is picked by the farmer.<sup>202</sup> The farmer must pick a date between April 16, 2020, through August 31, 2020.

Livestock, for the purposes of eligibility as a price trigger commodity under CFAP 2, includes three types of livestock: (1) cattle; (2) hogs and pigs; and (3) sheep and lambs.<sup>203</sup>

A different group of animals, which USDA calls "other livestock," are not eligible as price trigger commodities but are eligible as sales commodities. Sales commodities are discussed below.

As noted above, livestock produced by contract growers are not eligible for CFAP 2 as a price trigger commodity.<sup>204</sup>

#### **(i) Breeding Stock—Not Eligible**

Breeding stock are not eligible as livestock for CFAP 2.<sup>205</sup> This is a notable difference between CFAP 1 and CFAP 2. The logic of not including breeding stock is that they are kept for several years and their value is less likely to be affected by price changes caused by COVID-19.<sup>206</sup>

Replacement stock intended for breeding are, however, eligible.<sup>207</sup> So, females that have not produced an offspring, and males who have not started breeding females are eligible.

<sup>200</sup> CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22.B, page 6-21, para. 176.B (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 3 (April 27, 2021); USDA, CFAP FAQ, "What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?" (April 22, 2021).

<sup>201</sup> CFAP 2 Handbook, page 6-1, para. 165.A (April 14, 2021).

<sup>202</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,381 (September 22, 2020) (prefatory comments); CFAP 2 Handbook, page 6-1, para. 165.B (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 3 (April 27, 2021).

<sup>203</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Price trigger livestock and products"); CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22.B, 6-21, para. 176.B (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 3 (April 27, 2021). Livestock not listed as eligible by USDA are not eligible as a price trigger livestock commodity.

<sup>204</sup> CFAP 2 Handbook, page 6-21, para. 176.A-B (April 14, 2021).

<sup>205</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Price trigger livestock and products"); CFAP 2 Handbook, page 2-17, para. 22.B, page 6-21, para. 176.B (April 14, 2021).

<sup>206</sup> USDA, CFAP FAQ, "Why isn't breeding stock eligible for CFAP 2?" (April 22, 2021).

<sup>207</sup> USDA, CFAP FAQ, "Are 'replacement stock intended for breeding' cattle, hogs/pigs, sheep, and other livestock eligible?" (April 22, 2021).

Culled breeding stock, according to USDA, are not eligible.<sup>208</sup> This would seem to mean that an older breeding cow that has had a number of calves, but is now to be culled from the herd and sold at market, still counts as breeding stock and is not eligible.

## **(ii) Beef Cattle—Eligible**

Beef cattle are eligible price trigger commodities under CFAP 2.<sup>209</sup> Cattle, for this purpose, are defined in a particular way.<sup>210</sup> First, they must be bovine animals. Second, they must be commercially raised or maintained. Third, they may not be used for dairy production or intended for dairy production. Fourth, they do not include beefalo and bison. Beefalo and bison are eligible as “other livestock” in the sales commodities category discussed below.

For cattle, breeding stock means bulls and cows, so these cattle are not eligible.<sup>211</sup>

## **(iii) Hogs and Pigs—Eligible**

Hogs and pigs are eligible price trigger commodities for CFAP 2.<sup>212</sup> Hogs are defined as any swine weighing 120 pounds or more.<sup>213</sup> Pigs are defined as swine weighing less than 120 pounds.<sup>214</sup>

For hogs and pigs, breeding stock means boars and sows.<sup>215</sup> As noted above, that means boars and sows are not eligible for CFAP 2 as price trigger commodities.

<sup>208</sup> USDA, CFAP FAQ, “Are ‘replacement stock intended for breeding’ cattle, hogs/pigs, sheep, and other livestock eligible?” (April 22, 2021).

<sup>209</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Price trigger livestock and products”); CFAP 2 Handbook, page 2-17, para. 22.B, page 6-21, para. 176.B (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 3 (April 27, 2021).

<sup>210</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Cattle”).

<sup>211</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Breeding stock”); CFAP 2 Handbook, Exhibit 2, page 1, “Breeding stock” (April 14, 2021).

<sup>212</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Price trigger livestock and products”); CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22.B, 6-21, para. 176.B (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 3 (April 27, 2021).

<sup>213</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Hogs”); CFAP 2 Handbook, Exhibit 2, page 3, “Hogs” (April 14, 2021).

<sup>214</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Hogs”); CFAP 2 Handbook, Exhibit 2, page 4, “Pigs” (April 14, 2021).

<sup>215</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Breeding stock”); CFAP 2 Handbook, Exhibit 2, page 1, “Breeding stock” (April 14, 2021).

#### (iv) Sheep and Lambs—Eligible

Sheep are eligible price trigger commodities for CFAP 2.<sup>216</sup>

For lambs and sheep, breeding stock means rams and ewes.<sup>217</sup> As noted above, that means that rams and ewes are not eligible for CFAP 2 as price trigger livestock.

## 2. Price Trigger Crops

Price trigger crops include many of the major crops raised in the United States. USDA sometimes calls price trigger crops acreage-based crops.<sup>218</sup> Flat-rate crops, discussed below, are also acreage-based crops. The CFAP 2 Application has a specific section for identifying acreage-based crops, including both price trigger crops and flat-rate crops.<sup>219</sup> USDA sees aid for acreage-based crops as helping farmers absorb increased marketing costs due to COVID-19.<sup>220</sup> Compensation for acreage-based crops is for on-going market disruption and for assistance to a more orderly marketing.

USDA lists eight crops as eligible price trigger crops.<sup>221</sup> They are: (1) barley; (2) corn; (3) sorghum; (4) dual purpose sorghum; (5) soybeans; (6) sunflowers; (7) upland cotton; and (8) wheat.

USDA also says that other crops might be added.<sup>222</sup>

USDA limits the availability of CFAP 2 price trigger crops based on their intended use and their type.<sup>223</sup> The next sections discuss these eligibility issues for price trigger crops.

### a. Intended Uses of Price Trigger Crops

For price trigger crops, USDA rules limit the intended use of eligible crops.<sup>224</sup> Intended use means the end use for which the crop or commodity was grown and produced.<sup>225</sup>

<sup>216</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Price trigger livestock and products”); CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22.B, 6-21, para. 176.B (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 3 (April 27, 2021).

<sup>217</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Breeding stock”); CFAP 2 Handbook, Exhibit 2, page 1, “Breeding stock” (April 14, 2021).

<sup>218</sup> CFAP 2 Handbook, page 8-1, para. 250.A (April 14, 2021); CFAP 2 Application, AD-3117, Part G (January 19, 2021).

<sup>219</sup> CFAP 2 Application, AD-3117, Part G (January 19, 2021).

<sup>220</sup> CFAP 2 Handbook, page 8-1, para. 250.A (April 14, 2021).

<sup>221</sup> CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22.B, page 8-25, para. 261.A, Exhibit 2, page 4, “Price Trigger Crops” (April 14, 2021); USDA, CFAP FAQ, “What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?” (April 22, 2021). The FAQ does not include dual purpose sorghum.

<sup>222</sup> CFAP 2 Handbook, page 8-25, para. 261.A (April 14, 2021).

<sup>223</sup> For these restrictions, see CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021). 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>224</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>225</sup> 7 C.F.R. § 718.2, “Intended use” (2020).

The CFAP 2 Handbook lists six types of uses that are allowed for CFAP 2 price trigger crops. It also lists three types of uses that are not allowed. Not every intended use is allowed for each crop. The nine types of uses are defined in the sections that follow.

### **(i) Forage**

For some price trigger crops, the intended use can be forage.<sup>226</sup> That means the crop is intended to be harvested as feed for livestock.<sup>227</sup> This does not include crops grown with the intended use of grazing by livestock or the intended use of grain that may be fed to livestock. As noted below, crops intended for grazing are not eligible for CFAP.

### **(ii) Fresh**

An acceptable intended use for some price trigger crops is what FSA calls fresh.<sup>228</sup> This means the crop is intended to have an end use that does not require changes in the crop.<sup>229</sup> In other words, the crop is not altered by freezing, canning, pickling, salting, and so forth.

### **(iii) Green Manure—Not Allowed**

Crops intended to be used as green manure are not eligible as price trigger crops.<sup>230</sup> By green manure USDA means that the crop is not intended to be harvested.<sup>231</sup> It instead is plowed under to enrich the soil.

### **(iv) Grain**

For some price trigger crops, grain can be an intended use.<sup>232</sup> This means that the crop is intended to be harvested as small, hard seed such as corn, rye, oats, millet, or wheat.<sup>233</sup>

### **(v) Grazing—Not Allowed**

Crops intended to be used a grazing are not eligible as price trigger crops.<sup>234</sup> By grazing, USDA means the crop is intended solely for pasture for livestock to roam on and eat.<sup>235</sup>

<sup>226</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>227</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 6 (September 8, 2020).

<sup>228</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>229</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 6 (September 8, 2020).

<sup>230</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>231</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 6 (September 8, 2020).

<sup>232</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>233</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 6 (September 8, 2020).

<sup>234</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>235</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 7 (September 8, 2020).

**(vi) Left Standing—Not Allowed**

Crops intended to be left standing are not eligible as price trigger crops.<sup>236</sup> By left standing USDA means that the crop is intended to be left in the field unharvested.<sup>237</sup> It is not intended to be mechanically or manually harvested for any purpose. It is also not intended to be grazed by domestic livestock or otherwise harvested in any way. USDA thinks of this as usually done for soil erosion control and nutrient retention.

**(vii) Processed**

For some price trigger crops, the crop can be intended to be processed.<sup>238</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.<sup>239</sup>

**(viii) Seed**

For some price trigger crops, seed can be an eligible intended use.<sup>240</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.<sup>241</sup>

**(ix) Silage**

For some price trigger crops silage is an acceptable intended use.<sup>242</sup> For silage, the crop must be intended to be preserved through fermentation and then fed to livestock. Given that USDA says all commodities must be intended to be sold commercially, it may be that silage that is intended to be fed on the farm is not eligible.

**b. Eligible Price Trigger Crops**

USDA lists the following crops as eligible price trigger crops.<sup>243</sup> The type and use limitations are explained below.

**(i) Barley**

All types of barley are eligible.<sup>244</sup> The intended use for barley may be forage, grain, or silage.

<sup>236</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>237</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 7 (September 8, 2020).

<sup>238</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>239</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 8 (September 8, 2020).

<sup>240</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>241</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 8 (September 8, 2020).

<sup>242</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>243</sup> CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22.B, page 8-25, para. 261.A, Exhibit 2, page 4, "Price Trigger Crops" (April 14, 2021).

<sup>244</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

**(ii) Corn**

The following types of corn are eligible for as price trigger crops: (1) amylose; (2) blue; (3) grainless forage; (4) high amylse; (5) popcorn; (6) red; (7) strawberry popcorn; (8) tropical; (9) waxy; (10) white; and (11) yellow.<sup>245</sup> The intended use for corn can be fresh, grain, processed, seed, or silage.

**(iii) Sorghum**

All types of sorghum are eligible.<sup>246</sup> The intended use for sorghum can be forage, grain, seed, or silage.

**(iv) Dual Purpose Sorghum**

All types of dual purpose sorghum are eligible.<sup>247</sup> The intended use for dual purpose sorghum can be forage, grain, seed, or silage.

**(v) Soybeans**

All types of soybeans are eligible.<sup>248</sup> The intended use for soybeans can be forage, fresh, grain, seed, or processed.

**(vi) Sunflowers**

All types of sunflowers are eligible.<sup>249</sup> Sunflowers may be used for forage, grain, seed, or processed.

**(vii) Upland Cotton**

It is not clear if all types of upland cotton are eligible.<sup>250</sup> It is also not clear if there are restrictions based on the intended use for upland cotton.

**(viii) Wheat**

All types of wheat are eligible as price trigger crops.<sup>251</sup> Wheat may be used for forage, grain, or seed.

**c. Some Crops Not Eligible as Price Trigger Crops**

Several types of crops are not eligible as price trigger crops—even if they are listed above.

<sup>245</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>246</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>247</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>248</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>249</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>250</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>251</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).



### **(i) Volunteer Crops—Not Eligible**

Volunteer crops are not eligible as price trigger crops.<sup>252</sup> USDA defines volunteer crop.<sup>253</sup> A crop is considered a volunteer by USDA if it was planted in a previous crop year on the same acreage, or drifted from another acreage, successfully reseeded, and is growing in the current crop year without being intentionally sown or managed.

### **(ii) Prevented Planting—Not Eligible**

Prevented planting acres are not eligible as price trigger crops.<sup>254</sup> Prevented planting is defined by USDA.<sup>255</sup> It is the inability to plant the intended crop acreage with proper equipment by the final planting date for the crop type because of a natural disaster.

### **(iii) Experimental—Not Eligible**

Experimental crops are not eligible as price trigger crops.<sup>256</sup> USDA defines experimental crop.<sup>257</sup> For this purpose, the definition has three parts. First, an experimental crop is planted for experimental purposes under the direct supervision by a state experiment station or a commercial company. Second, the production of the crop is destroyed before harvest or is used for testing or other experimental purpose. Third, a representative of the state experiment station or commercial company certifies that any production harvested from the experiment will not be marketed.

## ***d. Acreage Report and Eligible Acres for Price Trigger Crops***

Payments for price trigger crops are based on what USDA calls eligible acres.<sup>258</sup> Prevented planting acres and experimental acres are not included in eligible acres. Failed acres are included.

Importantly, eligible acres are determined based on what a farmer reports on what USDA calls an acreage report (Form FSA-578).<sup>259</sup> For this reason, farmers

<sup>252</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>253</sup> Acreage and Compliance Determinations Handbook, page 2-60, para. 39.A, page 2-117, para. 74.E, Exhibit 3, page 13, "Volunteer Crop" (September 8, 2020).

<sup>254</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>255</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Prevented planting"); CFAP 2 Handbook, Exhibit 2, page 4, "Prevented Planting" (April 14, 2021); Acreage and Compliance Determinations Handbook, 2-CP, page 2-43, para. 37.A, page 2-117, para. 74.E, page 3-55, para. 162.D, Exhibit 2, page 10, "Prevented Planting" (September 8, 2020).

<sup>256</sup> CFAP 2 Handbook, page 8-26, para. 261.C (April 14, 2021).

<sup>257</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Experimental"); CFAP 2 Handbook, Exhibit 2, page 2, "Experimental" (April 14, 2021); Acreage and Compliance Determinations Handbook, 2-CP, page 2-87, para. 59.H, page 2-116 and 2-117, para. 74.D, Exhibit 11, page 3 para. 74.B (September 8, 2020).

<sup>258</sup> CFAP 2 Handbook, page 8-3, para. 250.D, page 8-4, para. 251.B, pages 8-2 and 8-3, para. 250.C, "Eligible acres," "Experimental acres," "Failed acres," "Prevented planting" (April 14, 2021).

<sup>259</sup> CFAP 2 Handbook, page 8-2, para. 250.C, "Eligible acres" (April 14, 2021).

applying for CFAP 2 for price trigger crops will need to file an acreage report with FSA.<sup>260</sup>

As with other information on the CFAP 2 Application, generally, USDA will look to see if USDA thinks the reported acreage is reasonable and accurate.<sup>261</sup>

## **B. Flat-Rate Crops**

A category of crops that USDA calls flat-rate crops are eligible for CFAP 2.<sup>262</sup> These include crops that USDA decided did not have a 5 percent price decline.<sup>263</sup> They also include crops for which USDA did not have enough data to calculate a price decline.

Somewhat confusingly, USDA sometimes calls flat-rate crops acreage-based crops.<sup>264</sup> Price trigger crops, discussed above, are also acreage-based crops.<sup>265</sup> USDA sees aid for acreage-based crops as helping farmers absorb increased marketing costs due to COVID-19.<sup>266</sup> Compensation for acreage-based crops, including flat-rate crops, is for on-going market disruption and for assistance for a more orderly marketing.

Because USDA determined a nationwide eligibility for flat-rate crops and acreage-based crops, individual farmers do not need to establish specific market disruptions, decreased prices, or increased marketing costs in order to apply for CFAP 2.

Payments for flat-rate crops are based on what USDA calls eligible acres.<sup>267</sup> Payment calculations for flat-rate crops are discussed below. As with information on the CFAP 2 application, generally, USDA will look to see if USDA thinks the reported acreage is reasonable and accurate.<sup>268</sup> Farmers applying for flat-rate crops will need to file what USDA calls an acreage report (Form FSA-578).<sup>269</sup>

### **1. Eligible Flat-Rate Crops**

Flat rate crops are set out by USDA.<sup>270</sup> They include, but are not limited to, the following: (1) alfalfa; (2) amaranth grain; (3) buckwheat; (4) canola; (5) ELS cotton; (6) crambe (colewort); (7) einkorn; (8) emmer; (9) flax; (10) guar; (11) hemp; (12) indigo; (13) industrial rice; (14) kenaf; (15) khorasan wheat; (16) millet; (17) mustard; (18) oats; (19) peanuts; (20) quinoa; (21) rapeseed; (22) sweet rice; (23) wild rice; (24)

<sup>260</sup> CFAP 2 Handbook, page 8-4, para. 251.A (April 14, 2021).

<sup>261</sup> CFAP 2 Handbook, page 8-4, para. 251.C (April 14, 2021).

<sup>262</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Flat-rate crop"); CFAP 2 Handbook, page 8-51, para. 273.A (April 14, 2021).

<sup>263</sup> CFAP 2 Handbook, page 8-51, para. 273.A (April 14, 2021).

<sup>264</sup> CFAP 2 Handbook, page 8-1, para. 250.A, page 8-51, para. 273.A (April 14, 2021).

<sup>265</sup> CFAP 2 Handbook, page 8-1, para. 250.A (April 14, 2021).

<sup>266</sup> CFAP 2 Handbook, page 8-1, para. 250.A (April 14, 2021).

<sup>267</sup> CFAP 2 Handbook, page 8-3, para. 250.E, page 8-4, para. 251.B, pages 8-2 and 8-3, para. 250.C, "Eligible acres," "Experimental acres," "Failed acres," "Prevented planting" (April 14, 2021).

<sup>268</sup> CFAP 2 Handbook, page 8-4, para. 251.C (April 14, 2021).

<sup>269</sup> CFAP 2 Handbook, page 8-4, para. 251.A (April 14, 2021); USDA, CFAP FAQ, "What if I don't have a 2020 FSA-578 crop acreage report on file with FSA?" (April 22, 2021).

<sup>270</sup> CFAP 1 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Flat-rate crop"); CFAP 2 Handbook, page 2-13, para. 21.A, page 2-17, para. 22B, page 8-51, para. 273.A, Exhibit 2, page 2, "Flat-Rate Crop" (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 4 (April 27, 2021) (does not include rye).

rye; (25) safflower; (26) sesame; (27) speltz; (28) sugar beets; (29) sugarcane; (30) teff; and (31) triticale.

Hemp, one of the flat rate crops listed above, has a particular definition.<sup>271</sup>

USDA also says it can add other eligible flat-rate crops if it chooses to do so.<sup>272</sup>

## 2. Not Eligible as Flat-Rate Crops

The following sections describe crops that are not eligible for CFAP 2 as flat-rate crops.

### ***a. Prevented Planting, Experimental Acres, Volunteer Crops, and Failed Acres***

Prevented planting acres, experimental acres, and volunteer crops are not included in eligible acres for flat-rate crops.<sup>273</sup> Failed acres are eligible.<sup>274</sup>

#### **(i) Prevented Planting—Not Eligible**

Flat-rate crops do not include prevented planting acres.<sup>275</sup> Prevented planting is defined by USDA.<sup>276</sup> It is the inability to plant the intended crop acreage with proper equipment by the final planting date for the crop type because of a natural disaster.

#### **(ii) Experimental Crops—Not Eligible**

Flat-rate crops do not include experimental crops.<sup>277</sup> USDA defines experimental crop.<sup>278</sup> For this purpose, the definition has three parts. First, an experimental crop is planted for experimental purposes under

<sup>271</sup> For CFAP 2 purposes, hemp means the plant *Cannabis sativa L.* and any part of that plant. This includes seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a THC concentration of not more than 0.3 percent on a dry weight basis. Hemp must be grown under an official certification or license issued by the applicable governing authority that permits the production of the hemp. CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Hemp”); CFAP 2 Handbook, page 8-2 para. 250.C, “Hemp,” Exhibit 2, page 3, “Hemp” (April 14, 2021).

<sup>272</sup> CFAP 2 Handbook, page 8-51, para. 273.A (April 14, 2021).

<sup>273</sup> CFAP 2 Handbook, page 8-52, para. 273.B (April 14, 2021).

<sup>274</sup> CFAP 2 Handbook, page 8-4, para. 251.B (April 14, 2021). Failed acres are acres that were timely planted with the intent to harvest, but because of disaster conditions, the crop failed before it could be brought to harvest. See CFAP 2 Handbook, page 8-2, para. C, “Failed acres” (April 14, 2021).

<sup>275</sup> CFAP 2 Handbook, page 8-52, para. 273.B (April 14, 2021); USDA, CFAP FAQ, “I grow a commodity in the flat rate category. How will my payments be calculated?” (April 22, 2021).

<sup>276</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Prevented planting”); CFAP 2 Handbook, Exhibit 2, page 4, “Prevented Planting” (April 14, 2021); Acreage and Compliance Determinations Handbook, 2-CP, page 2-43, para. 37.A, page 2-117, para. 74.E, page 3-55, para. 162.D, Exhibit 2, page 10, “Prevented Planting” (September 8, 2020).

<sup>277</sup> CFAP 2 Handbook, page 8-52, para. 273.B (April 14, 2021); USDA, CFAP FAQ, “I grow a commodity in the flat rate category. How will my payments be calculated?” (April 22, 2021).

<sup>278</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Experimental”); CFAP 2 Handbook, page 8-52, para. 273.B, Exhibit 2, page 2, “Experimental” (April 14, 2021); Acreage and Compliance Determinations Handbook, 2-CP, page 2-87, para. 59.H, page 2-116 and 2-117, para. 74.D, Exhibit 11, page 3 para. 74.B (September 8, 2020).

the direct supervision by a state experiment station or a commercial company. Second, the production of the crop is destroyed before harvest or is used for testing or other experimental purpose. Third, a representative of the state experiment station or commercial company certifies that any production harvested from the experiment will not be marketed.

### **(iii) Volunteer Crops—Not Eligible**

USDA defines volunteer crop.<sup>279</sup> A crop is considered a volunteer crop by USDA if it was planted in a previous crop year on the same acreage, or drifted from another acreage, successfully reseeded, and is growing in the current crop year without being intentionally sown or managed.

### ***b. Hay, Excluding Alfalfa, is Not Eligible as a Flat-Rate Crop***

Flat rate crops do not include hay, except for alfalfa.<sup>280</sup>

### ***c. Intended Uses of Crops that are Not Eligible for Flat-Rate Crops***

USDA limits the intended uses of flat-rate crops.<sup>281</sup> Three particular intended uses for a crop are not allowed by USDA for flat-rate crops.<sup>282</sup> Intended use means the end use for which the crop or commodity was grown and produced.<sup>283</sup>

#### **(i) Grazing**

Grazing is not an allowed intended use for flat-rate crops.<sup>284</sup> By grazing, USDA means the crop is intended solely for pasture for livestock to roam on and eat.<sup>285</sup>

#### **(ii) Left Standing**

Left standing is not an allowed intended use for flat-rate crops.<sup>286</sup> By left standing USDA means that the crop is intended to be left in the field

<sup>279</sup> CFAP 2 Handbook, page 8-52, para. 273.B (April 14, 2021); Acreage and Compliance Determinations Handbook, page 2-60, para. 39.A. page 2-117, para. 74.E, Exhibit 3, page 13, "Volunteer Crop" (September 8, 2020).

<sup>280</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Flat-rate crop"); CFAP 2 Handbook, page 8-2, para. 250.C, "Flat-rate crop," Exhibit 2, page 2, "Flat-Rate Crop" (April 14, 2021).

<sup>281</sup> CFAP 2 Handbook, pages 8-51 and 8-52, para. 273.A-B (April 14, 2021).

<sup>282</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Flat-rate crop"); CFAP 2 Handbook, page 8-52, para. 273.B (April 14, 2021).

<sup>283</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, "Commodity"); 7 C.F.R. § 718.2, "Intended use" (2020).

<sup>284</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Flat-rate crop"); CFAP 2 Handbook, page 8-52, para. 273.B (April 14, 2021).

<sup>285</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 7 (September 8, 2020).

<sup>286</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Flat-rate crop"); CFAP 2 Handbook, page 8-52, para. 273.B (April 14, 2021).

unharvested.<sup>287</sup> It is not intended to be mechanically or manually harvested for any purpose. It is also not intended to be grazed by domestic livestock or otherwise harvested in any way. USDA thinks of this as usually done for soil erosion control and nutrient retention.

### (iii) Green Manure

Green manure is not an allowed intended use for flat-rate crops.<sup>288</sup> By green manure USDA means that the crop is not intended to be harvested.<sup>289</sup> It instead is plowed under to enrich the soil.

## C. Sales Commodities

Sales commodities are a group of commodities that are eligible for CFAP 2.<sup>290</sup>

### 1. Sales Commodities—General Rules

Sales commodities are a group of eligible commodities that vary greatly among themselves.<sup>291</sup> What they have in common is that USDA has grouped them into a category for the purposes of CFAP 2 and has called them “sales commodities.” Sometimes USDA calls them “sales-based commodities.”<sup>292</sup>

In general, several categories of sales-based commodities are eligible.<sup>293</sup> They are: (1) aquaculture; (2) specialty crops, including fruits, horticulture, vegetables, tree nuts, and sales-based crops; (3) nursery crops and floriculture; (4) other livestock, including pullets; (5) miscellaneous commodities; (6) tobacco; and (7) turfgrass sod. USDA says that it may add commodities to this list.<sup>294</sup>

#### a. General Eligibility of Sales Commodities

USDA says that the eligible sales commodities have faced market disruptions, low prices, and significant marketing costs, with the marketing costs due to declines in demand, surplus production, disruptions in shipping, and marketing of

<sup>287</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 7 (September 8, 2020).

<sup>288</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Flat-rate crop”); CFAP 2 Handbook, page 8-52, para. 273.B (April 14, 2021).

<sup>289</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 6 (September 8, 2020).

<sup>290</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”); CFAP 2 Handbook, pages 7-21 and 7-22, para. 221.A (April 14, 2021).

<sup>291</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”); CFAP 2 Handbook, page 2-13, para. 21.A, page 7-1, para. 211.B (April 14, 2021).

<sup>292</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”); CFAP 2 Handbook, Exhibit 2, page 5, “Sales-Based Commodities” (April 14, 2021).

<sup>293</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”); CFAP 2 Handbook, pages 7-21 and 7-22, para. 221.A (April 14, 2021); CFAP 2 Application, AD-3117, Part F (January 19, 2021); USDA, CFAP FAQ, “What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?” (April 22, 2021).

<sup>294</sup> CFAP 2 Handbook, page 2-13, para. 21.A, Exhibit 2, page 5, “Sales-Based Commodities” (April 14, 2021).

commodities.<sup>295</sup> Because USDA made this decision for all eligible sales commodities nationwide, individual farmers do not need to establish any of these disruptions, decreased prices, or marketing costs in order to apply for CFAP 2.

### ***b. What is Included in Eligible Sales for Sales Commodities***

Payments for sales commodities for CFAP 2 are based in part on the farmer's certification of calendar year 2019 sales.<sup>296</sup> These sales can include expenses for sales-based commodities, such as bin charges and transportation costs, but only if such expenses are broken out and can be distinguished from other expenses.<sup>297</sup> If expenses are recorded as a single line item they cannot be included as eligible sales unless the farmer provides additional information to support the expenses.

In addition, recent changes to the CFAP 2 rules now allow the amount of crop insurance or other similar indemnities that the farmer received for the 2019 crop year to be included in the farmer's 2019 sales. In particular, the following indemnities can now be added to a farmer's 2019 sales numbers: (1) federal crop insurance indemnities; (2) Noninsured Crop Disaster Assistance Program (NAP) payments, and Wildfire and Hurricanes Indemnity Program Plus (WHIP+) payments.<sup>298</sup> Because 2019 crop sales are used as the basis to calculate sales-based commodity losses, this change will increase the CFAP 2 payment for many farmers.

Producers who began farming a specific sales commodity in 2020, and had no 2019 sales for that commodity, may be eligible for CFAP 2 using their actual 2020 sales.<sup>299</sup> USDA notes, however, that farmers who began farming in 2020 and are using their 2020 actual sales will not be able to include crops insurance payments, NAP, or WHIP+ payments.<sup>300</sup>

### ***c. Only Raw Commodities Grown by Farmer***

Sales commodities are only eligible for CFAP 2 as raw commodities grown by the farmer.<sup>301</sup> Any value added to the commodity by processing or packaging—

<sup>295</sup> CFAP 2 Handbook, page 7-1, para. 211.A (April 14, 2021).

<sup>296</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(i)) (January 19, 2021); CFAP 2 Handbook, page 2-14, para. 21.A, page 2-16, para. 22.A, page 7-22, para. 222.A (April 14, 2021). This change was created by the 2021 Appropriations Act.

<sup>297</sup> CFAP 2 Handbook, page 7-24, para. 222.A (April 14, 2021).

<sup>298</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, "Crop insurance," "NAP," "WHIP+"), 4883 (to be codified at 7 C.F.R. § 9.203(i)(1)) (January 19, 2021); CFAP Handbook page 2-14, para. 21.B, page 2-16, para. 22.A, page 7-22, para. 222.A, Exhibit 2, page 3, "NAP," Exhibit 2, page 5, "WHIP+" (April 14, 2021). NAP rules are at 7 C.F.R. part 1437 (2021). WHIP+ rules are at 7 C.F.R. part 760, subpart O (2021); USDA, CFAP 2 Fact Sheet, at 4 (April 27, 2021).

<sup>299</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021); CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(i)); CFAP 2 Handbook, page 7-24, para 222.B (April 14, 2021).

<sup>300</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021); CFAP 2 Handbook, page 7-24, para 222.B (April 14, 2021).

<sup>301</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(i)); CFAP 2 Handbook, pages 7-22 and 7-23, para 222.A, page 7-24, para. 222.B (April 14,

whether or not that occurs on the farm—is not eligible.<sup>302</sup> This also means that commodities that were bought for resale, and not grown by the farmer, are not eligible.

USDA explains that the value of eligible raw commodities is “the value of the production delivered to the first buying point, warehouse, or packer excluding any value derived from sorting, bagging, boxing, or other activities necessary for a consumer-ready sale.”<sup>303</sup> In other words, eligible sales commodities include only the value of the raw commodities that reflect the growing, harvesting, practices necessary for production (such as fumigation), and basic packaging for wholesale or bulk transportation.<sup>304</sup> Under this rule, processed commodities such as wine, yarn, or hides are not eligible for CFAP 2.<sup>305</sup> For example, sales of alpaca fleece can be counted, but if the fleece is further processed into yarn prior to sale, any portion of the sale that comes from that additional processing would not be eligible for a CFAP 2 payment.<sup>306</sup> This means that farmers may need to convert value-added sales into raw sales. This rule would also seem to apply to value-added products such as goat cheese, and other processed commodities like maple syrup.

#### ***d. Documentation for Sales Commodities***

As is the case with other CFAP 2 commodities, USDA may ask farmers for documentation of the sales described on the CFAP 2 application.<sup>307</sup> USDA may look to see if sales figures are reasonable to USDA.<sup>308</sup> Also, USDA may adjust the commodity sales in the farmer's application if USDA decides they are unreasonable or not accurate.<sup>309</sup> Sales numbers must also be reflected in farmer documentation if USDA asks for the documentation.<sup>310</sup> USDA advises that farmers who convert the sales of a value-added product into a value for the raw commodity should be able to document and explain how they determined the raw value for that commodity.<sup>311</sup>

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2021); USDA, CFAP FAQ, “What 2019 sales should I include on my CFAP 2 application for sales commodities?” (April 22, 2021).

<sup>302</sup> CFAP 2 Handbook, page 7-22, para 222.A, page 7-24, para. 222.B (April 14, 2021); USDA, CFAP FAQ, “What 2019 sales should I include on my CFAP 2 application for sales commodities?” (April 22, 2021).

<sup>303</sup> USDA, CFAP FAQ, “What 2019 sales should I include on my CFAP 2 application for sales commodities?” (April 22, 2021).

<sup>304</sup> The CFAP FAQ page provides many examples of eligible and ineligible raw sales commodities. See USDA, CFAP FAQ, “What 2019 sales should I include on my CFAP 2 application for sales commodities?” (April 22, 2021).

<sup>305</sup> USDA, CFAP FAQ, “What 2019 sales should I include on my CFAP 2 application for sales commodities?” (April 22, 2021).

<sup>306</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021).

<sup>307</sup> CFAP 2 Handbook, page 7-22, para 222.A, page 7-23, para. 222.B (April 14, 2021).

<sup>308</sup> CFAP 2 Handbook, page 7-23, para 222.B (April 14, 2021).

<sup>309</sup> CFAP 2 Handbook, page 7-24, para 222.D (April 14, 2021).

<sup>310</sup> CFAP 2 Handbook, page 7-24, para 222.D (April 14, 2021).

<sup>311</sup> USDA, CFAP FAQ, “What 2019 sales should I include on my CFAP 2 application for sales commodities?” (April 22, 2021).

## 2. Eligible Types of Sales Commodities

The following sections explain the rules for the six types of eligible sales commodities: (1) aquaculture; (2) specialty crops, including fruits, horticulture, vegetables, tree nuts, and sales-based crops; (3) nursery crops and floriculture; (4) other livestock, including pullets; (5) miscellaneous commodities; (6) tobacco; and (7) turfgrass sod.<sup>312</sup>

### a. Aquaculture

Sales-based commodities include aquaculture.<sup>313</sup> Aquaculture, for the purposes of CFAP 2, is defined by USDA.<sup>314</sup> It is: (1) any species of aquatic organisms that are grown for human consumption; (2) fish raised as feed for fish that are consumed by humans; and (3) ornamental fish that are propagated and reared in an aquatic medium. USDA considers mollusks to be aquaculture.<sup>315</sup>

In addition, for CFAP 2 purposes aquaculture species must be raised by a commercial operator.<sup>316</sup> They must also be raised in a controlled environment.<sup>317</sup>

<sup>312</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”) (January 19, 2021); CFAP Handbook, page 2-13, para. 21.A, page 7-22, para. 221.A (April 14, 2021); USDA, CFAP FAQ, “What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?” (April 22, 2021).

<sup>313</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”); CFAP 2 Handbook, page 2-13, para. 21.A, page 7-1, para. 211.B (April 14, 2021); USDA, Coronavirus Food Assistance Program 2 For Aquaculture Producers (May 31, 2021), at <https://www.farmers.gov/cfap/aquaculture>.

<sup>314</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Aquaculture”); CFAP 2 Handbook, Exhibit 2, page 1, “Aquaculture” (April 14, 2021).

<sup>315</sup> CFAP 2 Handbook, page 7-1, para. 211.B, page 7-21, para. 221.A (April 14, 2021); USDA, CFAP FAQ, “What aquaculture species are eligible for coverage under CFAP 2?” (April 22, 2021).

<sup>316</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Aquaculture”).

<sup>317</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Aquaculture”). With respect to aquaculture, a controlled environment is an environment in which everything that can practicably 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 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Controlled environment”); CFAP 2 Handbook, Exhibit 2, page 1, “Controlled Environment” (April 14, 2021).



## **b. Specialty Crops**

Sales commodities include what FSA calls specialty crops.<sup>318</sup> USDA sometimes refers to these as sales-based crops.<sup>319</sup> On the CFAP 2 Application, USDA simply calls these “crops.”<sup>320</sup>

For the purpose of CFAP 2 sales commodities, specialty crops include: (1) all specialty crops that were available in CFAP 1; and (2) crops identified by USDA's Agricultural Marketing Service (AMS) as specialty crops.<sup>321</sup>

More specifically, specialty crops (or, sales-based crops) are defined by USDA to include: (1) fruit; (2) horticulture; (3) vegetables; (4) tree nuts; and (5) other sales-based crops.<sup>322</sup>

The following rules apply.

### **(i) Eligible Intended Uses of Sales-Based Crops**

There can only be certain intended uses for eligible sales-based crops.<sup>323</sup> Intended use means the end use for which the crop or commodity was grown and produced.<sup>324</sup> Eligible sales-based crops cannot be intended to be used for grazing, green manure, or left standing.<sup>325</sup>

By grazing, USDA means the crop is intended solely for pasture for livestock to roam on and eat.<sup>326</sup> By green manure, USDA means that the crop is not intended to be harvested.<sup>327</sup> The crop instead is plowed under to enrich the soil. By left standing, USDA means that the crop is intended to be left in the field unharvested.<sup>328</sup> It is not intended to be mechanically

<sup>318</sup> CFAP 2 Handbook, page 7-21, para. 221.A (April 14, 2021); USDA, CFAP FAQ, “What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?” (April 22, 2021).

<sup>319</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”); CFAP 2 Handbook, Exhibit 2, page 5, “Sales-Based Crops” (April 14, 2021).

<sup>320</sup> CFAP 2 Application, AD-3117, Part F (January 19, 2021). More precisely, Part F of the CFAP 2 Application refers to these as “Crops (Excluding Part G Crops),” which simply means that sales crops do not include any of the price trigger or flat-rate acreage-based crops.

<sup>321</sup> CFAP 2 Handbook, page 7-21, para. 221.A (April 14, 2021). This means: (1) all of the specialty crops listed for CFAP 1, at FSA Handbook, Coronavirus Food Assistance Program, 1-CFAP, pages 8-1 to 8-44, para. 221-235 (September 15, 2020); and (2) AMS, USDA Definition of Specialty Crop (2020), at: <https://www.ams.usda.gov/sites/default/files/media/USDASpecialtyCropDefinition.pdf>.

<sup>322</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based crops”); CFAP 2 Handbook, Exhibit 2, page 5, “Sales-Based Crops” (April 14, 2021).

<sup>323</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386-59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based crops”).

<sup>324</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Commodity”); 7 C.F.R. 718.2, “Intended use” (2020).

<sup>325</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based crops”); CFAP 2 Handbook, Exhibit 2, page 5, “Sales-Based Crops” (April 14, 2021).

<sup>326</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 7 (September 8, 2020).

<sup>327</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 6 (September 8, 2020).

<sup>328</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 7 (September 8, 2020).

or manually harvested for any purpose. It is also not intended to be grazed by domestic livestock, or otherwise harvested in any way. USDA thinks of this as usually done for soil erosion control and nutrient retention.

## (ii) Eligible Fruits

Fruits that qualify as sales-based crops for CFAP 2 purposes are defined by USDA.<sup>329</sup> A recent rule has changed, slightly, the list of eligible fruits for CFAP 2.<sup>330</sup> The new rule also says that the calculation of benefits for fruits has changed, though it appears the change is very minor and will not result in any recalculated payments for farmers.<sup>331</sup>

Fruits are defined as all of the following: (1) abiu; (2) acerola (Barbados cherry); (3) achachairu; (4) antidesma; (5) apples; (6) apricots; (7) aronia (chokeberry); (8) atemoya (custard apple); (9) bananas; (10) blueberries; (11) breadfruit; (12) cacao; (13) caimito; (14) calabaza melon; (15) canary melon; (16) canary seed; (17) caneberries; (18) canistel; (19) cantaloupes; (20) carambola (21) star fruit); (22) casaba melon; (23) cherimoya (sugar apple); (24) cherries; (25) Chinese bitter melon; (26) citron; (27) citron melon; (28) coconuts; (29) cranberries; (30) crenshaw melon; (31) dates; (32) donaquia (winter melon); (33) durian; (34) elderberries; (35) figs; (36) genip; (37) gooseberries; (38) grapefruit; (39) grapes; (40) ground cherry; (41) guamabana (soursop); (42) guava; (43) guavaberry; (44) honeyberries; (45) honeydew; (46) huckleberries; (47) Israel melons; (48) jack fruit; (49) jujube; (50) juneberries; (51) kiwiberry; (52) kiwifruit; (53) Korean golden melon; (54) kumquats; (55) langsat; (56) lemons; (57) limequats; (58) limes; (59) longan; (60) loquats; (61) lychee; (62) mangos; (63) mangosteen; (64) mayhaw berries; (65) mesple; (66) mulberries; (67) nectarines; (68) oranges; (69) papaya; (70) passion fruits; (71) pawpaw; (72) peaches; (73) pears; (74) pecans; (75) pineapple; (76) pitaya (dragon fruit); (77) plantain; (78) plumcots; (79) plums; (80) pomegranates; (81) prunes; (82) pummelo; (83) raisins; (84) rambutan; (85) sapodilla; (86) sapote; (87) schizandra berries; (88) sprite melon; (89) star gooseberry; (90) strawberries; (91) tangelos; (92) tangerines; (93) tangors; (94) wampee; (95) watermelon; (96) wax jamboo fruit; and (97) wolfberry (goji).<sup>332</sup> A change to the CFAP 2 rules in the Federal Register added the following as eligible fruits (and removed these from the list of eligible tree nuts): avocados, noni, olives, persimmons, and quinces.<sup>333</sup>

<sup>329</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Fruits"); CFAP 2 Handbook, Exhibit 2, page 3, "Fruits" (April 14, 2021); USDA, CFAP FAQ, "Which fruits are eligible for CFAP 2?" (April 22, 2021).

<sup>330</sup> See CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.201, "Fruits" (January 19, 2021).

<sup>331</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks), 4880, Table 1 (January 19, 2021).

<sup>332</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Fruits"); USDA, CFAP FAQ, "Which fruits are eligible for CFAP 2?" (April 22, 2021).

<sup>333</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.201, "Fruits" (January 19, 2021); CFAP 2 Handbook, Exhibit 2, page 3, "Fruits" (April 14, 2021). These changes

### (iii) Eligible Horticulture

Horticulture qualifies as a sales-based crop under CFAP 2.<sup>334</sup>

Horticulture is defined by USDA for the purposes of CFAP 2, and includes the following: (1) anise; (2) basil; (3) cassava; (4) chervil (Fresh parsley); (5) chia; (6) chicory (radicchio); (7) cilantro; (8) cinnamon; (9) curry leaves; (10) galangal; (11) ginger; (12) ginseng; (13) guayule; (14) herbs; (15) hops; (16) lotus root; (17) marjoram; (18) meadowfoam; (19) mint; (20) moringa; (21) niger seed; (22) oregano; (23) parsley; (24) pennycress; (25) peppermint; (26) pohole; (27) psyllium; (28) rosemary; (29) sage; (30) savory; (31) shrubs (forbs); (32) sorrel; (33) spearmint; (34) tangos; (35) tea; (36); thyme; (37) turmeric; (38) vanilla; (39) wasabi; (40); water cress; and (41) yu cha.<sup>335</sup>

### (iv) Eligible Vegetables

Vegetables are an eligible sales-based based crop under CFAP 2.<sup>336</sup>

USDA created a list of eligible vegetables.<sup>337</sup> They include: (1) alfalfa sprouts; (2) aloe vera; (3) artichokes; (4) arugula greens; (5) asparagus; (6) bamboo shoots; (7) batatas; (8) bean sprouts; (9) beans, including dry edible beans; (10) beets; (11) bok choy; (12) broccoflower; (13) broccoli; (14) broccolini; (15) broccolo-cavalo; (16) Brussel sprouts; (17) cabbage; (18) callaloo; (19) carrots; (20) cauliflower; (21) celeriac; (22) celery; (23) chickpea (garbanzo beans); (24) chives; (25) collard greens; (26) coriander; (27) sweet corn; (28) cucumbers; (29) daikon; (30) dandelion greens; (31) dasheen (taro root); (32) malanga; (33) dill; (34) eggplant; (35) endive; (36) escarole; (37) frisee; (38) gailon (gai lein); (39) Chinese broccoli; (40) garlic; (41) gourds; (42) greens; (43) horseradish; (44) Jerusalem artichokes (sunchoke); (45) kale; (46) kohlrabi; (47) leeks; (48) lentils; (49) lettuce; (50) melongene; (51) mesclun mix; (52) microgreens; (53) mushrooms; (54) okra; (55) onions; (56) parsnip; (57) peas (including dry edible); (58) pebibaye (heart of palm); (59) peppers; (60) potatoes; (61) potatoes sweet; (62) pumpkins; (63) radicchio; (64) radishes; (65) rhubarb; (66) rutabaga; (67) salsify (oyster plant); (68) scallions; (69) seed - vegetable; (70) shallots; (71) spinach; (72) squash;

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have not been included in the USDA CFAP FAQ, "Which fruits are eligible for CFAP 2?" (April 22, 2021).

<sup>334</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Horticulture," "Sales-based crops"); USDA, CFAP FAQ, "Which other horticultural crops are eligible for CFAP 2?" (April 22, 2021); Coronavirus Food Assistance Program 2 for Specialty Crop Producers, Horticulture (May 31, 2021), at <https://www.farmers.gov/cfap/specialty>.

<sup>335</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Horticulture"); USDA, CFAP FAQ, "Which other horticulture crops are eligible for CFAP 2?" (April 22, 2021); Coronavirus Food Assistance Program 2 for Specialty Crop Producers, Horticulture (May 31, 2021), at <https://www.farmers.gov/cfap/specialty>.

<sup>336</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386-59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Sales-based crops," "Vegetables"); CFAP 2 Handbook, Exhibit 2, page 5, "Sales-Based Crops" (April 14, 2021).

<sup>337</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Vegetables"); USDA, CFAP FAQ, "What vegetables are eligible for CFAP 2?" (April 22, 2021).

(73) swiss chard; (74) tannier; (75) taro; (76) tomatillos; (77) tomatoes; (78) truffles; (79) turnip top greens; (80) turnips; (81) yam; (82) and yautia (malanga).

#### **(v) Eligible Tree Nuts**

Tree nuts qualify as a sales-based crop for CFAP 2 purposes by USDA.<sup>338</sup> Tree nuts are defined by USDA.<sup>339</sup> Following recent rule changes to CFAP 2, eligible tree nuts are: (1) almonds; (2) carob; (3) cashews; (4) chestnuts; (5) coffee; (6) hazel nuts; (7) jojoba; (8); macadamia nuts; (9) pecans; (10) pine nuts; (11) pistachios; and (12) walnuts.<sup>340</sup> A new rule in the Federal Register says the calculation of benefits for tree nuts has changed, though it appears the change is very minor and will not result in any recalculated payments for farmers.<sup>341</sup>

#### **(vi) Other Eligible Sales-Based Crops**

Although not called miscellaneous commodities, the following are listed as eligible sales-based crops: (1) ambrosia; (2) arundo; (3) camelina; (4) cactus; (5) cardoon; (7) honey; and (9) maple sap.<sup>342</sup> In addition, crops not listed as price trigger crops or as flat-rate crops are eligible as sales commodities.<sup>343</sup>

### **c. Nursery and Floriculture**

Sales-based commodities include nursery and floriculture.<sup>344</sup>

Nursery is defined by USDA.<sup>345</sup> It means decorative or nondecorative plants grown in a container or a controlled environment for commercial sale.<sup>346</sup>

<sup>338</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based crops”); CFAP 2 Handbook, Exhibit 2, page 5, “Sales-Based Crops” (April 14, 2021).

<sup>339</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Tree nuts”); CFAP 2 Handbook, Exhibit 2, page 5, “Tree Nuts” (April 14, 2021); USDA, CFAP FAQ, “What tree nuts are included?” (April 22, 2021).

<sup>340</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.201, “Tree nuts” (January 19, 2021); CFAP 2 Handbook, Exhibit 2, page 5, “Tree Nuts” (April 14, 2021).

<sup>341</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks), 4880, Table 1 (January 19, 2021). This change is not included on the USDA website.

<sup>342</sup> CFAP 2 Handbook, Exhibit 2, page 5, “Sales-Based Crops” (April 14, 2021).

<sup>343</sup> CFAP 2 Handbook, page 7-1, para. 211.B (April 14, 2021); CFAP 2 Application, Form AD-3117, Part F (January 19, 2021).

<sup>344</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”); CFAP 2 Handbook, page 2-13, para. 21.A, page 7-1, para. 211.B (April 14, 2021); USDA, Coronavirus Food Assistance Program 2 for Nursery and Floriculture Producers (May 31, 2021), at <https://www.farmers.gov/cfap/nursery>.

<sup>345</sup> CFAP 2 Handbook, Exhibit 2, page 4, “Nursery” (April 14, 2021).

<sup>346</sup> For purpose of nursery crops, a controlled environment is an environment 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 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Controlled environment”); CFAP 2 Handbook, Exhibit 2, page 1, “Controlled Environment” (April 14, 2021).

Floriculture, for the purposes of CFAP 2, is defined by USDA.<sup>347</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>348</sup>

#### ***d. Other Livestock—Including Pullets***

Sales-based commodities include what USDA calls “other livestock,” and sometimes calls “specifically identified livestock.”<sup>349</sup> Other livestock are defined generally as animals commercially raised for food, fur, fiber, or feathers.<sup>350</sup>

Other livestock that can be eligible are listed by USDA.<sup>351</sup> They include: (1) alpacas; (2) bison; (2) buffalo; (4) beefalo; (5) deer; (6) ducks; (7) elk; (8) emus; (9) geese; (10) goats; (11) guinea pigs; (12) llamas; (13) ostrich; (14) pheasants; (15) quail; (16) rabbits; (17) reindeer; and (18) turkey.

As of a January 19, 2021 rule, pullets are also now eligible as “other livestock” in the sales commodity category.<sup>352</sup> In particular, pullets may be counted as an “other livestock” sales commodity under CFAP 2.<sup>353</sup> USDA defines a “pullet” as a young female chicken that has not laid an egg.<sup>354</sup>

<sup>347</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Floriculture”); CFAP Handbook, page 7-5-12, para. 208.A, Exhibit 2, page 2, “Floriculture” (August 14, 2020).

<sup>348</sup> For the purpose of floriculture, a controlled environment is an environment in which everything that can practicably 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 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Controlled environment”); CFAP 2 Handbook, Exhibit 2, page 1, “Controlled Environment” (April 14, 2021).

<sup>349</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”); CFAP 2 Handbook, page 2-13, para. 21.A, page 7-1, para. 211.B, page 7-21, para. 221.A (April 14, 2021).

<sup>350</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Other livestock”); CFAP 2 Handbook, page 7-21, para. 221.A, Exhibit 2, page 4, “Other Livestock” (April 14, 2021); USDA, CFAP FAQ, “What other livestock will be considered under this category of payment?” (April 22, 2021).

<sup>351</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386, (September 22, 2020), (to be codified at 7 C.F.R. § 9.201, “Other livestock”); CFAP 2 Handbook, page 7-21, para. 221.A, page 7-22, para. 221.B, Exhibit 2, page 4, “Other Livestock” (April 14, 2021); USDA, CFAP FAQ, “What other livestock will be considered under this category of payment?” (April 22, 2021).

<sup>352</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, “Other livestock”) (January 19, 2021); CFAP 2 Handbook, page 7-21, para. 221.A, Exhibit 2, page 5, “Sales-based commodities” (April 14, 2021); USDA, CFAP FAQ, “What other livestock will be considered under this category of payment?” (April 22, 2021). USDA says this change is made because these producers face market disruptions, low prices, and significant marketing costs due to COVID-19. CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks) (January 19, 2021).

<sup>353</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, “Other livestock”) (January 19, 2021). USDA says this change is made because these producers face market disruptions, low prices, and significant marketing costs due to COVID-19.

<sup>354</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.201, “Pullets”) (January 19, 2021); CFAP 2 Handbook, Exhibit 2, page 5, “Pullet” (April 14, 2021).

In addition to pullets, the January 19, 2021, rule also makes water buffalo, yak, and pheasants, including chukars, eligible as “other livestock” in the sales commodity category for CFAP 2.<sup>355</sup> The rules also appear to add mink as eligible under the definition of other livestock, though the CFAP 2 Handbook describes mink as a “miscellaneous” sales commodity.<sup>356</sup>

Eligible “other livestock” also include the by-products of any live animals that fall within this category.<sup>357</sup> Fleece, milk, and eggs (except for eggs to be batched for breeding stock), for example, can be part of the other livestock by-product eligibility.<sup>358</sup>

Other livestock do not include, however, a number of animals.<sup>359</sup> These include: (1) all equine; (2) breeding stock; (3) reptiles; (4) amphibians; (5) bees; (6) companion or comfort animals; pets; and (7) animal raised for hunting or game purposes. For purposes of this rule, breeding stock includes livestock that are a sire or dam maintained to produce offspring.<sup>360</sup> USDA says it can add other livestock that are not eligible for CFAP 2.<sup>361</sup>

#### ***e. Miscellaneous Commodities***

USDA identifies a group of sales commodities that it calls miscellaneous commodities.<sup>362</sup> Sometimes they are called “specifically defined miscellaneous crops.”<sup>363</sup> They include: (1) goat milk; (2) mink, including pelts; (3) mohair; (4) wool;<sup>364</sup> and (5) Christmas trees.<sup>365</sup> As with other sales commodities, breeding

<sup>355</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § “Other livestock”) (January 19, 2021); CFAP 2 Handbook, page 7-21, para. 221.A (April 14, 2021). USDA says this change is made because these producers face market disruptions, low prices, and significant marketing costs due to COVID-19.

<sup>356</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § “Other livestock”) (January 19, 2021). Mink is listed as an eligible sales commodity in the CFAP 2 Handbook. CFAP 2 Handbook, page 2-13, para. 21.A, page 7-22, para. 221.A (April 14, 2021).

<sup>357</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4879 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, “Other livestock”) (January 19, 2021); CFAP 2 Handbook, page 7-22, para. 222.A (April 14, 2021).

<sup>358</sup> CFAP 2 Handbook, page 7-21, para. 221.A (April 14, 2021).

<sup>359</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386, (September 22, 2020), (to be codified at 7 C.F.R. § 9.201, “Other livestock”); CFAP 2 Handbook, page 7-22, para. 221.B, Exhibit 2, page 4, “Other Livestock” (April 14, 2021); USDA, CFAP FAQ, “What other livestock will be considered under this category of payment?” (April 22, 2021).

<sup>360</sup> CFAP 2 Handbook, Exhibit 2, page 1, “Breeding Stock” (April 14, 2021).

<sup>361</sup> CFAP 2 Handbook, Exhibit 2, page 4, “Other Livestock” (April 14, 2021).

<sup>362</sup> CFAP 2 Handbook, page 7-22, para. 221.A (April 14, 2021).

<sup>363</sup> CFAP 2 Handbook, page 7-1, para. 211.B (April 14, 2021).

<sup>364</sup> Wool is defined as the fiber sheared from a live sheep. It includes, unless otherwise noted, graded and ungraded wool. Graded wool is paid on a clean basis, and ungraded wool is paid on a greasy basis. See CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, “Wool”); CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Sales-based commodities”); CFAP 2 Handbook, page 2-13, para. 21.A (April 14, 2021).

<sup>365</sup> CFAP 2 Handbook, page 7-22, para. 221.A (April 14, 2021).

stock, companion or comfort animals, commodities raised by a contract grower, and any livestock raised for hunting or game purposes are not eligible.<sup>366</sup>

#### ***f. Tobacco***

Tobacco is a sales commodity for the purposes of CFAP 2.<sup>367</sup> Tobacco, unlike CFAP 2 commodities generally, is funded through the CARES Act, and is not funded through the CCC.<sup>368</sup>

As with sales-based crops, there can only be certain intended uses for tobacco.<sup>369</sup> Intended use means the end use for which the crop or commodity was grown and produced.<sup>370</sup> Eligible tobacco cannot be intended to be used for grazing, green manure, or left standing.<sup>371</sup>

By grazing, USDA means the crop is intended solely for pasture for livestock to roam on and eat.<sup>372</sup> By green manure, USDA means that the crop is not intended to be harvested.<sup>373</sup> The crop instead is plowed under to enrich the soil. By left standing, USDA means that the crop is intended to be left in the field unharvested.<sup>374</sup> It is not intended to be mechanically or manually harvested for any purpose. It is also not intended to be grazed by domestic livestock, or otherwise harvested in any way. USDA thinks of this as usually done for soil erosion control and nutrient retention.

#### ***g. Turfgrass Sod***

Originally, CFAP 2 did not cover turfgrass sod. However, with the recent changes to the program, turfgrass sod is now eligible as a sales-based commodity.<sup>375</sup>

<sup>366</sup> CFAP 2 Handbook, page 7-22, para. 221.B (April 14, 2021).

<sup>367</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Sales-based crops"); CFAP 2 Handbook, page 7-1, para. 211.B, page 7-22, para. 221.A (April 14, 2021).

<sup>368</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,383 (September 22, 2020) (prefatory comments); CFAP 2 Handbook, page 7-1, para. 211.B (April 14, 2021); FSA Notice CFAP-18, Approval of CARES Act-Funded Applications for Tobacco Only (April 19, 2021).

<sup>369</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386-59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Sales-based crops").

<sup>370</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2, "Commodity"); 7 C.F.R. 718.2, "Intended use" (2020).

<sup>371</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Sales-based crops"); CFAP 2 Handbook, Exhibit 2, page 5, "Sales-Based Crops" (April 14, 2021).

<sup>372</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 7 (September 8, 2020).

<sup>373</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 6 (September 8, 2020).

<sup>374</sup> Acreage and Compliance Determinations Handbook, 2-CP, Exhibit 11.E, page 7 (September 8, 2020).

<sup>375</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, "Sales-based commodities") (January 19, 2021); CFAP Handbook, page 2-13, para. 21.A, page 7-22, para. 221.A (April 14, 2021); USDA, CFAP FAQ, "What commodities and livestock are eligible for CFAP 2?", "What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?" (April 22, 2021).



## D. Contract Producer Commodities

With the passing of the 2021 Appropriations Act, contract growers may be eligible for CFAP 2, so long as the farmer grows or raises what USDA counts as an “eligible commodity.”<sup>376</sup> Contract farmers are eligible only if they produced hogs or poultry under contract. No other commodities are eligible. The following sections discuss the requirements for contract growers in more detail.

### 1. Eligible Contract Grower Commodities

Contract growers are only eligible for CFAP 2 if they raise swine or poultry.<sup>377</sup>

#### a. Swine

Swine are an eligible commodity for CFAP 2 contract producers. By swine, USDA means hogs and pigs.<sup>378</sup> Hogs are defined as any swine weighing 120 pounds or more. Pigs are defined as swine weighing less than 120 pounds.

#### b. Poultry

Poultry are an eligible commodity for CFAP 2 contract producers. By poultry, USDA means chickens, chicken eggs, and turkeys.<sup>379</sup> Chickens include broilers, pullets, and layers.<sup>380</sup> Broilers are defined as any chicken that is commercially produced for meat purposes, has not been used for laying or breeding purposes, and left the farm for slaughter.<sup>381</sup> By layer, USDA means a chicken that produces table or commercial type shell eggs.<sup>382</sup> By pullet, USDA means a young female chicken that has not laid an egg.<sup>383</sup> By chicken eggs, USDA means shell, dried, frozen, or liquid eggs.<sup>384</sup>

<sup>376</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. §§ 9.201, “Contract producer,” 9.202(b)(1)) (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, page 9-1, para. 300.A, page 9-21, para. 311.A (April 14, 2021); USDA, CFAP FAQ, “Are contract livestock producers eligible for CFAP?” (April 22, 2021).

<sup>377</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks) (January 19, 2021); CFAP 2 Handbook, page 2-14, para. 21.A, page 9-1, para. 300.B (April 14, 2021).

<sup>378</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.202(b)(1)) (January 19, 2021); CFAP 2 Handbook, page 2-14, para. 21.A, page 9-1, para. 300.B, Exhibit 2, page 3-4, “Hogs,” “Pigs” (April 14, 2021).

<sup>379</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.202(b)(1)) (January 19, 2021); CFAP 2 Handbook, page 9-1, para. 300.B, page 9-21, para. 311.A (January 15, 2020).

<sup>380</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.202(b)(1)) (January 19, 2021); CFAP 2 Handbook, page 2-14, para. 21.A, page 2-51, para. 35.A, page 9-1, para. 300.B, page 9-21, para. 311.A (April 14, 2021).

<sup>381</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (to be codified at 7 C.F.R. § 9.201, “Broilers”) (September 22, 2020); CFAP 2 Handbook, Exhibit 2, page 1, “Broilers” (April 14, 2021).

<sup>382</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.201, “Layers”) (January 19, 2021); CFAP 2 Handbook, Exhibit 2, page 3, “Layer” (April 14, 2021).

<sup>383</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.201, “Pullet”) (January 19, 2021); CFAP 2 Handbook, Exhibit 2, page 5, “Pullet” (April 14, 2021).

<sup>384</sup> CFAP 2 Handbook, page 9-1, para. 300.B, Exhibit 2, page 2, “Eggs” (April 14, 2021).



## 2. Documentation for Contract Growers

As is the case with other CFAP 2 commodities, USDA may ask contract growers for documentation to support their CFAP 2 application.<sup>385</sup> USDA will look at the CFAP 2 application to see if they believe it is reasonable before approving the application.<sup>386</sup> This will include an evaluation of whether a contract farmer's revenue information is reasonable. If USDA does not think that the revenue described is reasonable, USDA can ask the farmer to provide documentation to substantiate information included in the application by the farmer. This includes requesting a copy of the production contracts.

## III. Ineligible Commodities

USDA has said that certain commodities are not eligible for CFAP 2. This section describes those commodities.

### A. Certain Commodities Not Eligible for CFAP 2

USDA has created a list of commodities that are definitely not eligible for CFAP 2.

The following agricultural commodities that are not eligible for CFAP 2: (1) birdsfoot and trefoil; (2) clover; (3) cover crops; (4) fallow; (5) forage soybeans; (6) forage sorghum; (7) grass; (8) kochia (prostrata); (9) lespedeza; (10) milkweed; (11) mixed forage (12) pelts (except for mink); (13) perennial peanuts; (14) pollinators; (15) sunn hemp; (16) vetch; and (17) seeds from crops that are themselves not eligible.<sup>387</sup>

USDA says it may add other commodities as not eligible.<sup>388</sup>

### B. Garden Production—Both Commercial and Home—NOT Eligible

USDA rules say specifically that “gardens (commercial and home)” are not eligible for CFAP 2.<sup>389</sup> This rule can be found in the Federal Register, in the USDA CFAP 2 Handbook, and in USDA materials online. This garden restriction did not apply to CFAP 1. It is tucked into a definition of “ineligible commodities for CFAP 2.”

It is hard to know what USDA means by this restriction. The following sections look at what we know and do not know about the restriction, as well as what it might mean in practice.

<sup>385</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882 (to be codified at 7 C.F.R. § 9.202(c)) (January 19, 2021); CFAP 2 Handbook, page 2-1, para 15.A, page 2-51, para. 36.B, pages 3-4 and 3-5, para. 51.B, page 9-21, para. 311.A (April 14, 2021).

<sup>386</sup> CFAP 2 Handbook, page 3-6, para 51.D, page 9-22, para. 312.A (April 14, 2021).

<sup>387</sup> CFAP 2 Rule, 85 Fed. Reg. 59,389, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Ineligible commodities”); CFAP 2 Handbook, Exhibit 2, page 3, “Ineligible commodities” (April 14, 2021); CFAP 2 Fact Sheet, at 2 (April 27, 2021).

<sup>388</sup> CFAP 2 Handbook, Exhibit 2, page 3, “Ineligible commodities” (April 14, 2021).

<sup>389</sup> CFAP 2 Rule, 85 Fed. Reg. 59,389, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, “Ineligible commodities”); CFAP 2 Handbook, Exhibit 2, page 3, “Ineligible Commodities” (April 14, 2021); CFAP 2 Fact Sheet, at 2 (April 27, 2020).

## 1. No Definition

There is no USDA definition of “gardens (commercial and home),” of garden, of commercial garden, or of home garden.<sup>390</sup> As a practical matter, that leaves it up to USDA officials to apply whatever meaning the USDA official thinks it means.

## 2. Not Required by Statute

There does not appear to be any federal statute that would require USDA to adopt this rule for CFAP 2.<sup>391</sup> It is notable, in this regard, that this rule did not apply to CFAP 1. It appears, therefore, that USDA could change or eliminate the garden rule.<sup>392</sup>

## 3. No Further Explanation

Several people and organizations have attempted to get a clarification from USDA as to what the gardening restriction might mean. None has been forthcoming. One state office has suggested that farmers should not worry about this limit as long as the farmer sold commodities from a garden.

## 4. What the Gardening Restriction Might Mean

It is hard to know how the gardening restriction will affect farmer eligibility for CFAP 2.

### *a. Up to USDA Officials*

Because USDA created a restriction without explaining the meaning of the restriction, how it will actually work will be up to individual USDA officials. Given that there are hundreds of USDA offices making CFAP 2 eligibility decisions, and these decisions will be based on what will be a personal and subjective understanding of what constitutes a garden, it is extremely difficult to know what the practical effect of the restriction on gardening will mean.

It is possible that the gardening rule will be almost completely ignored. USDA officials at the state, district, and county level, however, are instructed to comply with the rules found in the Code of Federal Regulations and the CFAP 2 Handbook.<sup>393</sup> The rules, including the gardening rule, are not optional for USDA officials.

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<sup>390</sup> There is no definition in the CFAP 2 Federal Register rules, in the CFAP 2 Handbook, in Notices issued by USDA, or on the USDA website. There is no definition in 7 C.F.R. part 718 or in 7 C.F.R. part 1400. If there were, these definitions would apply. See CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,389, 59,384 (September 22, 2020) (to be codified at 7 C.F.R. § 9.2). Further, these terms do not seem to have been a part of any other USDA program that FLAG has been able to find.

<sup>391</sup> It does not appear to be required by the CARES Act or the CCC Charter.

<sup>392</sup> In CFAP 2 rules, USDA notes that it may change the eligibility rules for commodity eligibility.

<sup>393</sup> CFAP 2 Handbook, pages 1-5 through 1-10, para. 3.A-E (April 14, 2021).

***b. Home Gardens Already Not Eligible***

Other CFAP 2 rules make clear that to be eligible for CFAP 2 the commodity must be intended for sale.<sup>394</sup> If, as it seems, home garden production means garden production that is not for sale, that production is already not eligible for CFAP. The rule does not change the eligibility for a gardener that does not sell the garden production. Any production intended to be consumed by the household is not eligible not matter what kind of operation raises it. For a sweet corn operation, for example, the corn eaten by the family that produces it is not eligible for CFAP 2 even though sweet corn is generally eligible. Extremely small production for home consumption—what one would normally think of as a garden—is already not eligible for CFAP 2 even without the garden rule.

***c. Commercial Gardens Are at Issue***

If the gardening restriction was set aside, based on CFAP 2 rules, a commercial garden, even if it was quite small, would still be eligible like any other farm. That producer would likely not receive much money from CFAP 2, but it could be eligible.

If the restriction carries any weight at all, it will limit relatively small commercial farming operations that USDA officials decide are actually commercial gardens.

There is no reason to believe that the rule will be applied in the same way at all FSA offices across the country. Because there will be hundreds of USDA people enforcing the rule, and they have no definition to go on, it seems inevitable that the application of the gardening rule will vary significantly from place to place.

***d. Who Might Be Affected***

Inevitably, the farming operations that will be harmed by this restriction are relatively small. It seems likely that farms in populated, urban areas will be especially likely to be affected. Given the history—at USDA and elsewhere—to assume that all real farmers are white men, and to run USDA programs to exclude anyone who is not a white man, there is every reason to believe that when local USDA officials decide that farming operations are run by someone other than a white man, this will be more likely to be seen as a garden and not a farm. So, even if local officials use a uniform definition of garden, that definition will almost assuredly disproportionately harm anyone who is not a white man. It seems especially likely for smaller, urban, and direct marketing type of farms to be affected.

***e. The Decision to Apply***

Although it is not really possible to know how USDA will implement the gardening restriction, if a farmer is otherwise eligible, it probably makes sense to apply even if the operation is small. A strong case can be made that even very small operations are farms, not gardens.

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<sup>394</sup> See, for example, CFAP 2 Handbook, Exhibit 2, page 1, “Commodity” (April 14, 2021).

***f. Appeals***

As noted later in this Guide, farmers have the right to appeal CFAP 2 decisions. If a farmer is denied CFAP 2 benefits because USDA decides the operation is a commercial garden, feel free to contact FLAG. We may be able to assist a farmer with an appeal of the decision.

## Chapter Four: CFAP 2 Payments

CFAP 2 payments are calculated based on the type of eligible commodity and are subject to certain payment limitations. The following sections describe the rules for CFAP 2 payments.

### I. Calculating CFAP 2 Payments

CFAP 2 payments are calculated by USDA for each eligible commodity.<sup>395</sup> For purposes of determining payments, CFAP 2 commodities will fall into one of four general categories—price trigger commodities, flat-rate crops, sales commodities, or contract grower commodities.<sup>396</sup>

As noted earlier, USDA has previously had a CFAP 2 Application Generator and Payment Calculator, an Excel workbook that automatically calculated the farmer's potential CFAP payment. This appears not to be available any longer. In addition, USDA previously provided what it called a "CFAP 2 Eligible Commodities Finder," which allowed farmers to type in their specific commodities to determine whether or not they are eligible for the program. The Eligible Commodities Finder told the farmer whether the commodity is eligible, and if so what the applicable payment rate was and how USDA would calculate the CFAP 2 payment for that commodity. This also seems no longer available on the USDA website.

The sections that follow describe the logic of how USDA determines a farmer's CFAP 2 payment for each eligible commodity. The logic behind the CFAP 2 payments is confusing at times.

#### A. Payments for Price Trigger Commodities

Price trigger commodities include both livestock and livestock products as well as certain crops.<sup>397</sup> The eligible price trigger livestock are beef cattle, sheep and lambs, hogs and pigs, and broilers.<sup>398</sup> Breeding stock are not included. The eligible livestock products are dairy (cow's milk) and eggs. The price trigger crops are barley, corn, sorghum, soybeans, sunflowers, upland cotton, and all classes of wheat.

The following sections outline the steps for calculating payments for the various price trigger commodities.

##### 1. Calculating Dairy Payments

CFAP 2 payments for dairy losses are intended to assist dairy operations for marketing channel disruptions that occurred during quarters two through four of calendar year 2020 because of COVID-19.<sup>399</sup> To do this, USDA takes the farmer's *actual* milk production from April 1, 2020, through August 31, 2020, and then uses a formula to determine the farmer's *estimated* milk production for September 1, 2020 through

<sup>395</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,380 (September 22, 2020) (prefatory remarks).

<sup>396</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387-59,388 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202); CFAP 2 Handbook, pages 2-15 and 2-16, para. 22.A (April 14, 2021); USDA, CFAP FAQ, "What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?" (April 22, 2021).

<sup>397</sup> CFAP 2 Handbook, Exhibit 2, page 4, "Price Trigger Commodities" (April 14, 2021).

<sup>398</sup> CFAP 2 Handbook, Exhibit 2, page 4, "Price Trigger Commodities" (April 14, 2021); USDA, CFAP 2: Eligible and Ineligible Commodities (May 31, 2021), at: <https://www.farmers.gov/cfap/commodities>.

<sup>399</sup> CFAP 2 Handbook, page 4-1, para. 85.A (April 14, 2021).

December 31, 2020.<sup>400</sup> A farmer's total CFAP 2 dairy payment is the sum of the actual and estimated milk production, multiplied by a USDA payment rate that is the equivalent of \$1.20 per hundredweight.

The steps for dairy payment calculations are outlined below.<sup>401</sup> These steps apply to dairy operations that commercially market cow's milk (milk from bovines) in the United States at the time of enrollment in CFAP 2.<sup>402</sup>

The following steps are also used to determine the payment for a dissolved dairy operation and a seasonal dairy operation. For a dissolved operation, the payment will be prorated to reflect the number of days that the operation commercially markets milk between September 1, 2020, and December 31, 2020.<sup>403</sup> Similarly, for a seasonal dairy the payment will be prorated based on the number of days the operation was actually producing milk from September 1, 2020, through December 31, 2020.<sup>404</sup>

**Step One:** Determine the farmer's actual milk production, in pounds, for the time period from April 1, 2020, through August 31, 2020. This includes any milk dumped during that same timeframe.

**Step Two:** Determine the farmer's daily average milk production for April through August. To do this, take the farmer's actual production, as calculated in Step One, and divide that by 153, which is the number of days between April 1 and August 31.

**Step Three:** Determine the farmer's estimated milk production for September 1, 2020, through December 31, 2020. To do this, multiply the result of Step Two by 122, which is the number of days between September 1 and December 31.<sup>405</sup>

<sup>400</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(g)(1)); CFAP 2 Handbook, page 4-1, para. 85.A, page 4-31, para. 96.B, page 4-61, para. 111.B (April 14, 2021).

<sup>401</sup> For examples of how CFAP dairy payments are calculated, see CFAP 2 Handbook, pages 4-62 through 4-65, para. 111.C (April 14, 2021).

<sup>402</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,381, (September 22, 2020) (prefatory remarks); CFAP 2 Handbook, page 4-31, para. 96.A (April 14, 2021).

<sup>403</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(g)(1)); CFAP 2 Handbook, pages 4-31 and 4-32, para. 96.B-C (April 14, 2021). Farmers whose dairy operation has dissolved are required to report on the CFAP 2 application, Form AD-3117, the date the dairy operation stopped commercially marketing milk. CFAP 2 Application, Form AD-3117, Part C (January 19, 2021). If a dairy operation dissolves after enrolling in CFAP 2, the farmer may have to refund part of the CFAP 2 payment. CFAP 2 Handbook, pages 4-32, para. 96.C (April 14, 2021).

<sup>404</sup> CFAP 2 Handbook, page 4-32, para. 96.E (April 14, 2021). Farmers who have a seasonal dairy operation are required to report on the CFAP 2 application, Form AD-3117, the date the dairy operation stopped producing milk. CFAP 2 Application, Form AD-3117, Part C (January 19, 2021). If a dairy operation stops producing milk after enrolling in CFAP 2, the farmer may have to refund part of the CFAP 2 payment. CFAP 2 Handbook, pages 4-32, para. 96.E (April 14, 2021).

<sup>405</sup> For a dissolved dairy, multiply the result of Step Two by the number of days the operation commercially marketed milk between September 1, 2020, and December 31, 2020. For a seasonal dairy, multiply the result of Step Two by the number of days the operation was actually producing milk between September 1, 2020, and December 31, 2020.

**Step Four:** Determine the farmer's total milk production—both actual and estimated—for April 1, 2020, through December 31, 2020. To do this, add together the results of Step One and Step Three.

**Step Five:** Determine the farmer's total CFAP 2 dairy payment by taking the result of Step Four (the farmer's total actual and estimated milk production) and multiplying it by the USDA payment factor of \$0.012.<sup>406</sup>

Examples of how dairy payments work can be found in the CFAP 2 Handbook.<sup>407</sup>

## 2. Calculating Egg Payments

CFAP 2 payments for eggs are intended to compensate farmers for losses to shell, dried, liquid, and frozen eggs caused by market disruptions, low prices, and significant marketing costs due to COVID-19.<sup>408</sup> To do this, USDA takes 75 percent of the farmer's 2019 eligible egg production and multiplies that by a pre-determined payment rate.<sup>409</sup> For egg producers that began farming in 2020, the CFAP 2 payment will be calculated using the farmer's actual 2020 production numbers.<sup>410</sup> Only egg production that did not have a guaranteed price is eligible for CFAP 2.<sup>411</sup>

According to USDA, egg producers suffered at least a 5 percent price decline in the average price of eggs, when comparing the average for the week of January 13-17, 2020, with the average for the week of July 27-31, 2020.<sup>412</sup> USDA says the payment rates reflect the relative price decline of eggs.

### *a. Converting Eggs Still in the Shell to Pounds—Dried, Liquid, and Frozen Eggs Only*

When farmers apply for CFAP 2 they must self-certify their shell, dried, liquid, and frozen egg production.<sup>413</sup> The self-certification is for the farmer's 2019 production. For shell eggs, the certification is by the dozen. For dried, liquid, or frozen eggs, the certification is by the pound. Some farmers, such as those who sell their dried, liquid or frozen eggs still in the shell, will need to convert their eggs into pounds. If applicable, USDA provides the following conversion formulas.

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<sup>406</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(g)(1)); CFAP 2 Handbook, page 4-61, para. 111.B (April 14, 2021).

<sup>407</sup> CFAP 2 Handbook, pages 4-62 through 4-65, para. 111.C (April 14, 2021).

<sup>408</sup> CFAP 2 Handbook, page 5-1, para. 125.A-B (April 14, 2021).

<sup>409</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(h)(1)); CFAP 2 Handbook, page 5-1, para. 125.B (April 14, 2021).

<sup>410</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,381 (September 22, 2020) (prefatory remarks); CFAP 2 Handbook, page 5-31, para. 136.B (April 14, 2021).

<sup>411</sup> CFAP 2 Handbook, page 5-31, para. 136.A (April 14, 2021).

<sup>412</sup> CFAP 2 Handbook, page 5-1, para. 125.A (April 14, 2021).

<sup>413</sup> CFAP 2 Handbook, page 5-32, para. 137.A (April 14, 2021).

### (i) Converting Eggs In the Shell to Pounds

USDA has a formula to follow to convert eggs still in a shell into pounds.<sup>414</sup> For the purpose of this formula, the standard weight assumed for thirty dozen eggs is forty-eight pounds. USDA assumes that 83 percent (0.83) of the shell egg is liquid egg.<sup>415</sup>

### (ii) Converting Eggs Sold by the Case to Pounds

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>416</sup> For this formula, thirty dozen eggs are assumed to be in a case.

### (iii) Converting Eggs Sold by the Dozen to Pounds

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>417</sup>

### (iv) Converting Liquid/Frozen Eggs to Dried Eggs

If a farmer needs to convert liquid or frozen eggs to dried eggs, or vice versa, the USDA conversion formula is one pound of dried eggs equals 2.25 pounds of liquid or frozen eggs.<sup>418</sup>

## b. Egg Payment Calculation

The following steps are taken to figure out a farmer's CFAP 2 egg payment.<sup>419</sup>

**Step One:** Determine the farmer's total 2019 production for each eligible egg commodity.<sup>420</sup> For dried, liquid, and frozen eggs, this production should be in pounds. This may mean converting eggs to pounds, as is described above. For shell eggs, this production should be in dozens. If the farmer did not begin egg operations until 2020, the production is based on the farmer's actual 2020 production, through the date the farmer submits a CFAP 2 application for payment.<sup>421</sup>

<sup>414</sup> CFAP 2 Handbook, page 5-32, para. 137.A (April 14, 2021).

<sup>415</sup> If a farmer separates egg yolks and egg whites, and sells them as different types (for example, yolks are frozen while the egg whites remain liquid), the following percentages should replace the 83 percent in any conversion formula: 57.6 percent for egg whites; and 25.4 percent for egg yolks. CFAP 2 Handbook, page 5-32, para. 137.A (April 14, 2021).

<sup>416</sup> CFAP 2 Handbook, page 5-32, para. 137.A (April 14, 2021).

<sup>417</sup> CFAP 2 Handbook, page 5-32, para. 137.A (April 14, 2021).

<sup>418</sup> CFAP 2 Handbook, page 5-32, para. 137.A (April 14, 2021).

<sup>419</sup> CFAP 2 Handbook, pages 5-61 and 5-62, para. 148 (April 14, 2021).

<sup>420</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(h)(1)); CFAP 2 Handbook, pages 5-61 and 5-62, para. 148 (April 14, 2021).

<sup>421</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(h)(2)); CFAP 2 Handbook, pages 5-61 and 5-62, para. 148 (April 14, 2021).



**Step Two:** For each eligible egg commodity, multiply the production determined in Step One by 0.75.

**Step Three:** For each eligible egg commodity, multiply the result of Step Two by the appropriate USDA payment rate.<sup>422</sup>

**Total Egg Payment:** The farmer's total CFAP 2 egg payment is the found by adding together the totals from Step Three for each eligible egg commodity.

Examples of how egg payments work can be found in the CFAP 2 Handbook.<sup>423</sup>

USDA may adjust the farmer's certified production if USDA decides that the quantities are unreasonable or inaccurate.<sup>424</sup> They may also make an adjustment to match the inventory based on evidence submitted by the farmer.

### 3. Calculating Payments for Broilers

CFAP 2 payments are intended to compensate farmers for losses to broilers that occurred because of market disruptions, low prices, and significant marketing costs due to COVID-19.<sup>425</sup> To do this, USDA takes 75 percent of the farmer's 2019 eligible broiler production and multiplies that by a pre-determined payment rate of \$1.01 per bird.<sup>426</sup> For farmers that began broiler operations in 2020, with no 2019 production, the CFAP 2 payment will be calculated using the farmer's actual 2020 production numbers.<sup>427</sup>

According to USDA, broilers suffered at least a 5 percent price decline when comparing the average for the week of January 13-17, 2020, with the average for the week of July 27-31, 2020.<sup>428</sup> USDA says the payment rates reflect the relative price decline of broilers.

To be eligible for CFAP 2, the farmer must be an independent grower and not a contract grower.<sup>429</sup>

The following steps are taken to figure out a farmer's CFAP 2 broiler payment.<sup>430</sup>

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<sup>422</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387-59,388 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(h)(1)); CFAP 2 Handbook, pages 5-61 and 5-62, para. 148 (April 14, 2021).

<sup>423</sup> CFAP 2 Handbook, pages 5-62 to 5-63, para. 149.A (April 14, 2021).

<sup>424</sup> CFAP 2 Handbook, page 5-33, para. 137.D (April 14, 2021).

<sup>425</sup> CFAP 2 Handbook, page 5-1, para. 125.A-B (April 14, 2021).

<sup>426</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(h)(1)); CFAP 2 Handbook, page 5-1, para. 125.B, page 5-61, para. 148.A (April 14, 2021).

<sup>427</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,381 (September 22, 2020) (prefatory remarks); CFAP 2 Handbook, page 5-31, para. 136.B, page 5-61, para. 148.A (April 14, 2021).

<sup>428</sup> CFAP 2 Handbook, page 5-1, para. 125.A (April 14, 2021).

<sup>429</sup> CFAP 2 Handbook, page 5-31, para. 136.A (April 14, 2021).

<sup>430</sup> CFAP 2 Handbook, page 5-61, para. 148.A (April 14, 2021).

**Step One:** Determine the farmer's total 2019 production of broilers, by head, that were marketed for slaughter in calendar year 2019.<sup>431</sup> If the farmer did not begin broiler operations until 2020, the production should be based on the farmer's actual 2020 production, through the date the farmer submits a CFAP 2 application for payment.

**Step Two:** Multiply the production determined in Step One by 0.75.

**Step Three:** Multiply the result of Step Two by the USDA payment rate of \$1.01 to get the farmer's total CFAP 2 broiler payment.<sup>432</sup>

An example of how a broiler payment works can be found in the CFAP 2 Handbook.<sup>433</sup>

USDA may adjust the farmer's certified production if USDA finds that the quantities are unreasonable or inaccurate.<sup>434</sup> They may also make an adjustment to match the actual inventory based on evidence submitted by the farmer.

#### 4. Calculating Payments for Price Trigger Livestock

CFAP 2 payments for eligible price trigger livestock—meaning cattle, hogs and pigs, and sheep and lambs—are calculated in the same way.<sup>435</sup> The farmer's highest owned inventory of eligible livestock—on a date the farmer selects between April 16, 2020, and August 31, 2020—is multiplied by a pre-determined payment rate.

According to USDA, beef cattle, hogs and pigs, and sheep and lambs all suffered at least a 5 percent price decline when comparing average prices for the week of January 13-17, 2020, with the average for the week of July 27-31, 2020.<sup>436</sup> USDA says the payment rates are based on the market price decline for each type of eligible livestock.

The steps for livestock payment calculations are outlined below.<sup>437</sup>

**Step One:** For each species of eligible livestock, select the highest number of owned livestock inventory on any date between April 16, 2020, and August 31, 2020.<sup>438</sup> This includes inventory of eligible beef cattle, hogs, pigs, sheep and lambs, but does not include breeding stock.<sup>439</sup>

<sup>431</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(f)(1)); CFAP 2 Handbook, page 5-32, para. 137.B, page 5-61, para. 148.A (April 14, 2021).

<sup>432</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387-59,388 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(f)(1)); CFAP 2 Handbook, pages 5-61 and 5-62, para. 148 (April 14, 2021).

<sup>433</sup> CFAP 2 Handbook, page 5-63, para. 149.A (April 14, 2021).

<sup>434</sup> CFAP 2 Handbook, page 5-33, para. 137.D (April 14, 2021).

<sup>435</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(c)-(e)); CFAP 2 Handbook, page 6-1, para. 165.A-B (April 14, 2021).

<sup>436</sup> CFAP 2 Handbook, page 6-1, para. 165.A-B (April 14, 2021).

<sup>437</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(c)-(e)); CFAP 2 Handbook, page 6-1, para. 165.A-B, page 6-45, para. 188.B (April 14, 2021).

<sup>438</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(c)-(e)); CFAP 2 Handbook, page 6-1, para. 165.B, page 6-45, para. 188.B (April 14, 2021).

<sup>439</sup> For the applicable definition of breeding stock, see CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,386 (September 22, 2020) (to be codified at 7 C.F.R. § 9.201, "Breeding stock"); CFAP 2 Handbook, Exhibit 2, page 1, "Breeding Stock" (April 14, 2021).

**Step Two:** For each species of eligible livestock, multiply the result of Step One by the pre-set USDA payment rate for that species.<sup>440</sup>

**Total Livestock Payment:** A farmer's CFAP 2 payment for livestock is the sum of the Step Two results for each species of livestock.

Examples of how livestock payments work for a cow-calf operation, a feedlot operation, and a diversified livestock operation can be found in the CFAP 2 Handbook.<sup>441</sup>

## 5. Calculating Payments for Price Trigger Crops

Price trigger crops include the following acreage-based row crops: (1) barley; (2) corn; (3) sorghum; (4) dual purpose sorghum; (5) soybeans; (6) sunflowers; (7) upland cotton; and (8) all classes of wheat.<sup>442</sup> USDA says additional price trigger crops may become eligible for CFAP 2 in the future. To be eligible, price trigger crops must fall within the intended use categories that USDA has set.<sup>443</sup>

According to USDA, payments for eligible price trigger crops take into account five main factors: (1) eligible acres for the crop; (2) either the weighted 2020 APH-approved yield, or a percentage of the weighted 2019 ARC-CO benchmark yield; (3) the decline in average prices for the crop between the average for the week of January 13-17, 2020, and the average for the week of July 27-31, 2020; (4) an eighty percent coverage factor for each crop; and (5) an estimated share of 2020 crop marketing percentages from harvest through December 31, 2020 for each crop.<sup>444</sup>

### *a. Determining APH or ARC-CO Yields*

CFAP 2 payments for price trigger crops are based on the specific type of crop. They also hinge on whether the farmer insured the crop with federal crop insurance.<sup>445</sup> Recent changes in 2021 now allow some farmers without a 2020 APH-approved yield to use 100 percent of the weighted 2019 Agriculture Risk Coverage-County Option (ARC-CO) benchmark yield.<sup>446</sup>

<sup>440</sup> For the applicable payment rates, see CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(c)-(e)); CFAP 2 Handbook, page 6-45, para. 188.A (April 14, 2021).

<sup>441</sup> CFAP 2 Handbook, pages 6-46 through 6-49, para. 188.C (April 14, 2021).

<sup>442</sup> CFAP 2 Handbook, page 8-25, para. 261.A (April 14, 2021).

<sup>443</sup> CFAP 2 Handbook, page 8-26, para. 261.B (April 14, 2021).

<sup>444</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,380 (September 22, 2020) (prefatory remarks); CFAP 2 Handbook, page 8-3, para. 250.D, page 8-71, para. 284.A (April 14, 2021). Although USDA does not define precisely what a crop marketing percentage is, it seems that this percentage is intended to represent the estimated percentage for each crop that would likely be marketed through quarter four of calendar year 2020. See Coronavirus Food Assistance Program 2, Cost-Benefit Analysis, page 11 (September 15, 2020), at: [https://www.farmers.gov/sites/default/files/documents/CFAP\\_2-CBA-09252020.pdf](https://www.farmers.gov/sites/default/files/documents/CFAP_2-CBA-09252020.pdf).

<sup>445</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021); CFAP 2 Handbook, page 8-3, para. 250.D, page 8-27, para. 262.A (April 14, 2021).

<sup>446</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(a)(3)) (January 19, 2021). For an explanation of the logic of this change, see CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021).

### **(i) Farmer With a Weighted 2020 APH-Approved Yield**

If the farmer insured the price trigger crop, and the farmer has a weighted 2020 APH-approved yield, that will be the basis of the calculation for the farmer's payment.<sup>447</sup> USDA has access to the information from crop insurance records.

### **(ii) Farmer Without a Weighted 2020 APH-Approved Yield**

The 2021 changes to CFAP 2 apply when the farmer does not have a weighted 2020 APH-approved yield.<sup>448</sup> If USDA is not able to obtain the 2020 APH approved yield, payments are based on the 2019 ARC-CO benchmark yield.<sup>449</sup>

Previously, every farmer who did not have a weighted 2020 APH-approved yield had to use 85 percent of the 2019 ARC-CO benchmark yield to get a 2020 actual production history (APH) approved yield for CFAP 2 purposes.<sup>450</sup>

The 2021 changes to CFAP 2 allow some farmers that do not have a 2020 APH-approved yield to use 100 percent of the weighted 2019 ARC-CO benchmark yield.<sup>451</sup> That can be the case if the farmer meets one of four conditions.<sup>452</sup> First, 100 percent of the weighted 2019 ARC-CO can be used if the farmer has coverage under certain types of federal crop insurance.<sup>453</sup> Second, it can be used if the farmer is a landlord and the landlord's share is insured by the tenant under an RMA policy or a plan of insurance. Third, it can be used if the farmer is a tenant and the farmer's share is insured by the landlord with federal crop insurance. Finally, it can be used if the farm is a joint venture and the crop is insured by a member under an RMA policy or plan of insurance.

<sup>447</sup> CFAP 2 handbook, pages 8-27 to 8-29, para. 262.B-D (April 14, 2021).

<sup>448</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021); CFAP 2 Handbook, page 8-27, para. 262.A, page 8-71, para. 284.A (April 14, 2021).

<sup>449</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks), 4883 (to be codified at 7 C.F.R. § 9.203(a)(3)) (January 19, 2021).

<sup>450</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021); CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(a)(3)); CFAP 2 Handbook, page 8-3, para. 250.D, page 8-27, para. 262.A, pages 8-31 and 8-32, para. 262.F-G, pages 8-73 and 8-74, para. 284.C-D (April 14, 2021).

<sup>451</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(a)(3)) (January 19, 2021). For an explanation of the logic of this change, see CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021).

<sup>452</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks), 4883 (to be codified at 7 C.F.R. § 9.203(a)(3)(i)(A)-(D)) (January 19, 2021); CFAP 2 Handbook, page 8-27, para. 262.A, page 8-30, para. 262.E (April 14, 2021).

<sup>453</sup> The qualifying crop insurance plans include Area Risk Protection Insurance Plan, Margin Protection Plan, Stacked Income Protection Plan, Supplemental Coverage Option, or Whole-Farm Revenue Protection Plan.

In all other situations the rule is not changed, and farmers without a weighted 2020 APH-approved yield must use 85 percent of the 2019 ARC-CO benchmark as an approved yield.<sup>454</sup>

USDA provides several examples for how these calculations work.<sup>455</sup>

***b. Eligible Acres for Price Trigger Crops***

Eligible acres, for purposes of price trigger crops, means the farmer's share of 2020 determined or reported acres, as reported on form FSA-578, the Report of Acreage.<sup>456</sup> Eligible acres do not include prevented planting or experimental acres.<sup>457</sup> Failed acres are considered eligible.

***c. Minimum Payment Rate for Price Trigger Crops***

A farmer's CFAP 2 payment for price trigger crops will not be less than fifteen dollars per eligible acre of the farmer's price trigger crop.<sup>458</sup>

***d. Payment Calculation for Price Trigger Crops***

The general payment calculation for price trigger crops involves the following steps.<sup>459</sup>

**Step One:** Determine the number of eligible acres of the price trigger crop, as described above.<sup>460</sup>

**Step Two:** Determine the farmer's yield.

If the farmer has an RMA policy for that crop, use the farmer's 2020 APH-approved yield.<sup>461</sup>

If the farmer does not have an RMA policy for the crop, use either 85 percent or 100 percent the weighted 2019 ARC-CO benchmark yield for the crop, as described above.<sup>462</sup>

**Step Three:** Multiply the result of Step One by the yield from Step Two.

<sup>454</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(a)(3)(ii)) (January 19, 2021).

<sup>455</sup> CFAP 2 Handbook, pages 8-31 to 8-34, para. 262.G-H, pages 8-73 and 8-74, para. 284.C-D (April 14, 2021).

<sup>456</sup> CFAP 2 Handbook, page 8-2, para. 250.C, "Eligible acres," page 8-3, para. 250.D (April 14, 2021).

<sup>457</sup> CFAP 2 Handbook, page 8-2, para. 250.C, "Eligible acres" (April 14, 2021).

<sup>458</sup> CFAP 2 Handbook, page 8-71, para. 284.A (April 14, 2021).

<sup>459</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,388 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(a), (j)); CFAP 2 Handbook, page 8-73, para. 284.A (April 14, 2021).

<sup>460</sup> CFAP 2 Handbook, page 8-3, para. 250.D, page 8-27, para. 262.A, page 8-73, para. 284.C (April 14, 2021).

<sup>461</sup> CFAP 2 Handbook, page 8-3, para. 250.D, pages 8-28 and 8-29, para. 262.D (April 14, 2021).

<sup>462</sup> CFAP 2 Handbook, page 8-3, para. 250.D, pages 8-30 and 8-31, para. 262.E-G (April 14, 2021).

**Step Four:** Multiply the result of Step Two by the payment rate for the crop.<sup>463</sup>

**Step Five:** Multiply the result of Step Three by the crop marketing percentage for the crop.<sup>464</sup>

**Step Six:** Determine whether the result of Step Four is greater than fifteen dollars per eligible acre. To do this, first take the number of eligible acres from Step One and multiply those acres by fifteen dollars.<sup>465</sup>

**Total Price Trigger Crop Payment:** Compare the results of Step Five with the result of Step Six—whichever amount is greater will be the farmer's CFAP 2 payment.<sup>466</sup>

Examples of how payments for price trigger crops work can be found in the CFAP 2 Handbook.<sup>467</sup>

### ***e. Additional “Top-Up” Payment for Price Trigger Crops***

In addition to the CFAP 2 payment for price trigger crops described immediately above, USDA is also providing what it calls “top-up” payments to farmers of eligible price trigger crops.<sup>468</sup> These payments, which were authorized by the 2021 Appropriations Act, amount to twenty dollars per eligible acre.<sup>469</sup>

Any farmer who applies for CFAP 2 for the first time will receive the additional payment for price trigger crops.<sup>470</sup> For farmers who previously applied for and received a CFAP 2 payment for price trigger crops, USDA says there is no need to do anything further in order to receive the top-up payment—those payments should automatically be made to eligible farmers.<sup>471</sup>

<sup>463</sup> CFAP 2 Handbook, page 8-71, para. 284.A (April 14, 2021). Payment rates for price trigger crops can be found at: CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,388 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(a), (j)); CFAP 2 Handbook, page 8-72, para. 284.B (April 14, 2021).

<sup>464</sup> CFAP 2 Handbook, page 8-71, para. 284.A (April 14, 2021). Crop marketing percentages for price trigger crops can be found at: CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,388 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(a), (j)); CFAP 2 Handbook, page 8-72, para. 284.B (April 14, 2021).

<sup>465</sup> USDA, CFAP FAQ, “I did not apply for CFAP 2, but I raise row crops that fall under the price-trigger or flat-rate crop category. Am I now eligible and do I get the additional payment?” (April 22, 2021).

<sup>466</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,388 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(a), (j)); CFAP 2 Handbook, page 8-73, para. 284.C (April 14, 2021).

<sup>467</sup> CFAP 2 Handbook, pages 8-73 and 8-74, para. 284.C-D (April 14, 2021).

<sup>468</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, page 2 (March 23, 2021); USDA, CFAP FAQ, “I grow a commodity classified as a price trigger commodity. How is my payment calculated?” (April 22, 2021).

<sup>469</sup> 2021 Appropriations Act § 751 (December 27, 2020); FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, page 2 (March 23, 2021); USDA, CFAP FAQ, “I grow a commodity classified as a price trigger commodity. How is my payment calculated?” (April 22, 2021).

<sup>470</sup> USDA, CFAP FAQ, “I did not apply for CFAP 2, but I raise row crops that fall under the price-trigger or flat-rate crop category. Am I now eligible and do I get the additional payment?” (April 22, 2021).

<sup>471</sup> USDA, CFAP FAQ, “I applied for CFAP 2 and received payments for my flat-rate and price-trigger crops. Do I need to do anything to receive the \$20/acre payment?” (April 22, 2021).

## **B. Payments for Flat-Rate Crops**

Eligible flat-rate crops for purposes of CFAP 2 are those acreage-based crops that USDA decided did not meet the five percent price decline, as well as crops for which USDA decided there was not enough data to decide if there was a five percent decline.<sup>472</sup>

The following rules apply to payments for flat-rate crops.

### **1. Eligible Intended Uses for Flat-Rate Crops**

Unlike price trigger crops, nearly all intended uses of flat-rate crops are eligible.<sup>473</sup> Exceptions are crops intended for grazing, those left standing, or green manure crops, all of which are not eligible. Prevented planting crops and volunteer flat-rate crops are also not eligible.<sup>474</sup>

### **2. Eligible Acres for Flat-Rate Crops**

Payments for flat-rate crops are based on the number of eligible acres. For this purpose, eligible acres means the farmer's share of 2020 determined or reported acres, as reported on form FSA-578, the Report of Acreage.<sup>475</sup> Eligible acres do not include prevented planting or experimental acres.<sup>476</sup> Failed acres are eligible.

### **3. Minimum Payment Rate for Flat-Rate Crops**

A farmer's CFAP 2 payment for flat-rate crops will not be less than fifteen dollars per eligible acre of the farmer's flat-rate crop.<sup>477</sup>

### **4. Calculating Payments for Flat-Rate Crops**

The following steps are followed to determine the payment for all flat-rate crops.

**Step One:** Determine the number of eligible acres of the flat-rate crop, as described above.<sup>478</sup>

**Step Two:** Multiply the result of Step One by fifteen dollars.<sup>479</sup>

An example of how a payment for flat-rate crops works can be found in the CFAP 2 Handbook.<sup>480</sup>

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<sup>472</sup> CFAP 2 Handbook, page 8-51, para. 273.A (April 14, 2021).

<sup>473</sup> CFAP 2 Handbook, page 8-52, para. 273.B (April 14, 2021).

<sup>474</sup> CFAP 2 Handbook, page 8-52, para. 273.C (April 14, 2021).

<sup>475</sup> CFAP 2 Handbook, page 8-2, para. 250.C, "Eligible acres" (April 14, 2021).

<sup>476</sup> CFAP 2 Handbook, page 8-2, para. 250.C, "Eligible acres" (April 14, 2021).

<sup>477</sup> 2021 Appropriations Act § 751 (December 27, 2020); FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, page 2 (March 23, 2021).

<sup>478</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(b)); CFAP 2 Handbook, page 8-2, para. 250.C, "Eligible acres," 8-75, para. 285.A (April 14, 2021).

<sup>479</sup> CFAP 2 Handbook, page 8-75, para. 285.A (April 14, 2021).

<sup>480</sup> CFAP 2 Handbook, page 8-75, para. 285.B (April 14, 2021).

## 5. Additional “Top-Up” Payment for Flat-Rate Crops

In addition to the CFAP 2 payment for flat-rate crops described immediately above, USDA is also providing what it sometimes calls “top-up” payments to farmers of eligible flat-rate crops.<sup>481</sup> These payments, which were authorized by the 2021 Appropriations Act, amount to twenty dollars per eligible acre.<sup>482</sup>

Any farmer who applies for CFAP 2 for the first time will receive the additional payment for flat-rate crops.<sup>483</sup> For farmers who previously applied for and received a CFAP 2 payment for flat-rate crops, USDA says there is no need to do anything further in order to receive the top-up payment—those payments should automatically be made to eligible farmers.<sup>484</sup>

### C. Payments for Sales Crops

Sales-based commodities include most specialty crops, as well as aquaculture, nursery and floriculture, goat milk, mink, mohair, wool, pullets, and turfgrass sod.<sup>485</sup>

#### 1. Based on 2019 Sales and Certain Indemnities

Payments for sales commodities are based primarily on the farmer’s certification of 2019 sales, meaning any sales received in calendar year 2019.<sup>486</sup> USDA must determine that the sales are “reasonable.”<sup>487</sup>

In addition, recent changes to CFAP 2 now allow the following indemnities to be added to a farmer’s 2019 sales numbers: (1) federal crop insurance indemnities; (2) Noninsured Crop Disaster Assistance Program (NAP) payments; and (3) Wildfire and Hurricanes Indemnity Program Plus (WHIP+) payments.<sup>488</sup>

<sup>481</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, page 2 (March 23, 2021); USDA, CFAP FAQ, “I grow a commodity in the flat rate category. How will my payments be calculated?” (April 22, 2021); USDA, CFAP 2 Fact Sheet, at 4 (April 27, 2021).

<sup>482</sup> 2021 Appropriations Act § 751 (December 27, 2020); FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, page 2 (March 23, 2021); USDA, CFAP FAQ, “I grow a commodity in the flat rate category. How will my payments be calculated?” (April 22, 2021).

<sup>483</sup> USDA, CFAP FAQ, “I did not apply for CFAP 2, but I raise row crops that fall under the price-trigger or flat-rate crop category. Am I now eligible and do I get the additional payment?” (April 22, 2021).

<sup>484</sup> USDA, CFAP FAQ, “I applied for CFAP 2 and received payments for my flat-rate and price-trigger crops. Do I need to do anything to receive the \$20/acre payment?” (April 22, 2021).

<sup>485</sup> USDA, CFAP 2: Eligible and Ineligible Commodities (May 31, 2021), at: <https://www.farmers.gov/cfap/commodities>.

<sup>486</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(i)(1)) (January 19, 2021); CFAP 2 Handbook, page 2-16, para. 22.A, page 7-22, para. 222.A, page 7-45, para. 235.A-B (April 14, 2021); USDA, CFAP FAQ, “What is included in the 2019 sales used to calculate payments?” (April 22, 2021).

<sup>487</sup> CFAP 2 Handbook, page 7-22, para. 222.A (April 14, 2021).

<sup>488</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks), 4882 (to be codified at 7 C.F.R. § 9.201, “Crop insurance,” “NAP,” “WHIP+”), 4883 (to be codified at 7 C.F.R. § 9.203(i)(1)) (January 19, 2021); CFAP 2 Handbook page 2-14, para. 21.B, page 2-16, para. 22.A, page 7-22, para. 222.A, Exhibit 2, page 3, “NAP,” Exhibit 2, page 5, “WHIP+” (April 14, 2021). NAP rules are at 7 C.F.R. part 1437 (2021). WHIP+ rules are at 7 C.F.R. part 760, subpart O (2021).



## 2. Only Sales of Raw Commodities Count

The only eligible sales of commodities in this category are the sales of raw commodities grown by the farmer.<sup>489</sup> Any sales from adding value to the commodity—such as through processing, packaging, or purchasing for resale—are not eligible for CFAP 2.<sup>490</sup> Farmers may therefore need to convert value-added sales into raw sales.<sup>491</sup> Expenses for sales-based commodities, such as bin charges and transportation costs, may be included in eligible sales of sales-based commodities, but only if such expenses are broken out and can be distinguished.<sup>492</sup> If expenses are recorded as a single line item they cannot be included as eligible sales unless the farmer provides additional information to support the expenses.

## 3. Calculating Payments for Sales Crops

To determine the CFAP 2 payment for commodities in the sales category, USDA multiplies a pre-set payment factor by the farmer's 2019 sales.<sup>493</sup> The calculation is more complicated, however, because USDA has created five different sales ranges, with five different payment rates (from 8.8 percent to 10 percent) that are applied based on the amount of sales the farmer made in 2019.<sup>494</sup> The five sales ranges are: (1) up to \$49,999; (2) between \$50,000 and \$99,999; (3) between \$100,000 and \$499,999; (4) between \$500,000 and \$999,999; and (5) one million dollars and over.

The following steps are taken to determine a farmer's CFAP 2 payment for sales commodities.

**Step One:** Determine the total amount of sales of raw commodities made in calendar year 2019 within each of the five sales ranges.<sup>495</sup> The sales should include any crop insurance indemnities, NAP payments, or WHIP+ payments for eligible sales commodities in the 2019 crop year.<sup>496</sup> For farmers who began farming in 2019, and had no sales due to the immaturity of the commodity, the farmer can use their actual 2020 sales as of the date the CFAP 2 application is

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<sup>489</sup> CFAP 2 Handbook, page 7-22, para. 222.A (April 14, 2021); USDA, CFAP FAQ, "What is included in the 2019 sales used to calculate payments?" (April 22, 2021).

<sup>490</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks), 4883 (to be codified at 7 C.F.R. § 9.203(i)(1)) (January 19, 2021).

<sup>491</sup> USDA, CFAP FAQ, "How will producers who process their own crop instead of selling the raw commodity determine the farm gate value?" "Will FSA provide guidance on how to remove the processing or packaging value for producers with commodities that are sold with processing or packaging?" (April 22, 2021).

<sup>492</sup> CFAP 2 Handbook, page 7-24, para. 222.A (April 14, 2021).

<sup>493</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(i)(1)) (January 19, 2021); CFAP 2 Handbook, page 7-45, para. 235.A-B (April 14, 2021).

<sup>494</sup> CFAP 2 Handbook, page 7-45, para. 235.A-B (April 14, 2021).

<sup>495</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(i)(1)) (January 19, 2021); CFAP 2 Handbook, page 7-45, para. 235.A-B (April 14, 2021). An example of determining the amount of sales of raw commodities can be found at: CFAP 2 Handbook, page 7-23, para. 222.A (April 14, 2021).

<sup>496</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(i)(1)) (January 19, 2021); CFAP 2 Handbook, page 7-22, para. 222.A (April 14, 2021). A

submitted.<sup>497</sup> If actual 2020 sales are used, the total sales cannot include crop insurance indemnities, NAP payments, or WHIP+ payments.<sup>498</sup>

**Step Two:** For each applicable sales range, multiply the result of Step One by the corresponding payment rate.<sup>499</sup>

**Step Three:** Add together the results of Step Two for each sales range in order to get the total CFAP 2 payment for sales commodities.<sup>500</sup>

As an example, if a farmer's 2019 sales of eligible commodities totaled \$75,000, the CFAP 2 payment would be calculated as [\$49,999 times 10.6 percent] plus [\$25,001 times 9.9 percent], for a total payment of \$7,775.<sup>501</sup>

Additional examples of calculating CFAP 2 payments for sales commodities can be found in the CFAP 2 Handbook.<sup>502</sup>

USDA may adjust the farmer's 2019 total sales if it decides the information is unreasonable or inaccurate.<sup>503</sup> USDA may also adjust the 2019 total sales to reflect the farmer's actual total sales, based on documentation provided by the farmer. Finally, USDA may adjust a new farmer's 2020 sales, based on documentation provided by the farmer.

#### D. Payments for Contract Producers

Contract growers of eligible swine and poultry—including hogs, pigs, broilers, pullets, layers, chicken eggs, and turkeys—are now eligible for CFAP 2 assistance.<sup>504</sup> However, as noted earlier, USDA has put a pause on payments for these producers “while the CFAP Program is under review.”<sup>505</sup> USDA says it will still accept CFAP 2 applications from contract producers, and that once a decision has been reached by USDA it will provide at least an additional thirty days for contract producers to sign up for the program. This suggests that payments to contract growers will be made eventually.

<sup>497</sup> CFAP 2 Handbook, page 7-24, para. 222.B (April 14, 2021). USDA, CFAP FAQ, “I started farming in 2020 and grow a commodity that is part of the sales approach. I didn’t have any 2019 sales. Can I participate in CFAP 2?” (April 22, 2021). Examples of determining the appropriate amount of sales of sales for new farmers can be found at CFAP 2 Handbook, pages 7-24 and 7-25, para. 222.B (April 14, 2021).

<sup>498</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4883 (to be codified at 7 C.F.R. § 9.203(i)(1)) (January 19, 2021); CFAP 2 Handbook, page 7-24, para. 222.B (April 14, 2021). A

<sup>499</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387-59,388 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(i), (j)). The sales ranges and corresponding payment rates can be found at CFAP 2 Handbook, page 7-45, para. 235.B (April 14, 2021).

<sup>500</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387-59,388 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(i), (j)); CFAP 2 Handbook, page 7-45, para. 235.B (April 14, 2021).

<sup>501</sup> USDA, CFAP FAQ, “What commodities are included in the three different categories that USDA has established to assist producers impacted by COVID-19 and what are the payment rates?” (April 22, 2021).

<sup>502</sup> CFAP 2 Handbook, page 7-46, para. 235.B (April 14, 2021).

<sup>503</sup> CFAP 2 Handbook, page 7-24, para. 222.D (April 14, 2021).

<sup>504</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4882 (to be codified at 7 C.F.R. §§ 9.201, “Contract producer,” 9.202(b)(1)) (January 19, 2021); CFAP 2 Handbook, page 2-1, para. 15.A, page 9-1, para. 300.B, page 9-21, para. 311.A (April 14, 2021).

<sup>505</sup> USDA, CFAP FAQ, “Are contract livestock producers eligible for CFAP?” (April 22, 2021).

Under the existing rules, the following steps are used to determine the CFAP 2 payment for contract producers of swine or poultry.

**Step One:** Determine the contract producer's eligible revenue received between January 1, 2020, through December 27, 2020.

**Step Two:** Determine the contract producer's eligible revenue received between January 1, 2019, through December 27, 2019.<sup>506</sup>

**Step Three:** Subtract the result of Step Two from the Result of Step One.

**Step Four.** Multiply the result of Step Three by 80 percent in order to determine the contract producer's CFAP 2 payment.<sup>507</sup>

## II. Payments Not Subject to USDA Offset

Payments received under CFAP 2 are not subject to USDA offset.<sup>508</sup> This means that CFAP 2 payments will not be withheld by USDA in order to satisfy a USDA debt.

## III. Payments and Liens

USDA will make CFAP 2 payments to the farmer regardless of whether there are existing liens on the commodities that led to CFAP eligibility.<sup>509</sup>

## IV. Accepting CFAP Payments Means Authorizing Inspections

Any farmer who receives a CFAP 2 payment must allow USDA to enter the farm during regular business hours to inspect and examine the farm.<sup>510</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.

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<sup>506</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4883 (to be codified at 7 C.F.R. § 9.203(l)(1)) (January 19, 2021); CFAP Handbook page 2-16, para. 22.A, page 9-45, para. 326.B, Exhibit 20, page 5 (April 14, 2021).

<sup>507</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks), 4883 (to be codified at 7 C.F.R. § 9.203(l)(1)) (January 19, 2021); CFAP Handbook page 2-16, para. 22.A, page 9-45, para. 326.B, Exhibit 20, page 5 (April 14, 2021).

<sup>508</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(c)); CFAP 2 Handbook, page 2-15, para. 22.A (April 14, 2021); USDA, CFAP FAQ, "Can CFAP payments be withheld to satisfy a USDA debt?" (April 22, 2021).

<sup>509</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(c)).

<sup>510</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.6(b)); CFAP 2 Handbook, page 1-11, para. 3.G (April 14, 2021). This includes authorized representatives of USDA and the Government Accountability Office (GAO).

## V. 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 2.<sup>511</sup> Payment limitations can be complicated, as can the strategies used by farmers to limit the effect of these rules.<sup>512</sup> USDA describes the payment limitation rules that apply for CFAP 2 in detail.<sup>513</sup> For purposes of determining the applicable payment limitations, CFAP 1 and CFAP 2 are treated as entirely separate programs.<sup>514</sup> In other words, any payments received under CFAP 1 do not impact the payment limitations for CFAP 2.

### A. General Rule—\$250,000

In general, no person may receive more than 250,000 dollars in CFAP 2 payments.<sup>515</sup> This limitation applies to the combined total of all CFAP 2 payments for all eligible commodities, including contract grower commodities. The same limit applies to contract growers as well as legal entities—except general partnerships and joint ventures.<sup>516</sup> The rules for joint operations, including general partnerships and joint ventures, are somewhat different.<sup>517</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>518</sup> These added amounts are

<sup>511</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(e)); CFAP 2 Handbook, page 2-3, para. 16.A (April 14, 2021); USDA, CFAP 2 Fact Sheet, at 5 (April 27, 2021).

<sup>512</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 through 279 (October 2, 2019).

<sup>513</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,381-59,382, 59,385 (September 22, 2020) (prefatory comments; to be codified at 7 C.F.R. § 9.7(e)); CFAP 2 Handbook, pages 2-3 through 2-8, para. 16 (April 14, 2021).

<sup>514</sup> USDA, CFAP FAQ, “What are the payment limits for CFAP?” (April 22, 2021).

<sup>515</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1)); CFAP 2 Handbook, page 2-3, para. 16.A (April 14, 2021).

<sup>516</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4878 (prefatory remarks) (January 19, 2021); CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(e)); CFAP 2 Handbook, page 2-3, para. 16.A (April 14, 2021).

<sup>517</sup> CFAP 2 Handbook, page 2-3, para. 16.A (April 14, 2021). 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>518</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(e)); CFAP 2 Handbook, pages 2-3 through 2-7, para. 16.B-D (April 14, 2021); USDA, CFAP FAQ, “What are the payment limits for CFAP?” (April 22, 2021). 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.

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

Following recent changes to the CFAP 2 rules, some entities may be able to request an increase in their payment limitation to either 500,000 dollars or 750,000 dollars.<sup>519</sup>

### **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>520</sup>

## **VI. Federal Income Tax and CFAP 2 Payments**

The Internal Revenue Service (IRS) has said publicly it believes CFAP payments for tax year 2020 are agricultural program payments that need to be included as gross income.<sup>521</sup> It seems likely that CFAP 2 payments will be counted as taxable income by the IRS.

For its part, USDA says CFAP 2 payments will be reported to the IRS on Form CCC 1099-G.<sup>522</sup> USDA advises farmers to speak with the IRS or a tax preparer to determine exactly how a CFAP 2 payment might impact the farmer's taxes.

Many states have their own income tax, and those tax codes may or may not follow federal income tax rules.

## **VII. 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>523</sup>

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<sup>519</sup> For more details on requesting a payment limitation increase, see CFAP 2 Handbook, page 2-7, para. 16.D (April 14, 2021); USDA, CFAP FAQ, "What are the payment limits for CFAP?" "Can our entity request an increase to our payment limitation now that these additional payments will be issued?" (April 22, 2021).

<sup>520</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(e)(1), (3)); CFAP 2 Handbook, page 2-7, para. 16.D (April 14, 2021). The attribution rules at 7 C.F.R. § 1400.105 (2020) also apply.

<sup>521</sup> Internal Revenue Service, Farmers' Tax Guide: For Use in Preparing 2020 Returns, Publication no. 225, pages 2, 8 (October 15, 2020), at <https://www.irs.gov/pub/irs-pdf/p225.pdf>.

<sup>522</sup> USDA, CFAP FAQ, "Are CFAP payments going to be counted as taxable income?" (April 22, 2021).

<sup>523</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.

## Chapter Five: CFAP 2 Sign-Up and Application

To apply for a CFAP 2 payment, a farmer must submit a completed application. The following sections outline the key aspects of the CFAP 2 application process.

### I. Sign-Up Period Reopened April 5, 2021

The deadline to apply for CFAP 2 reopened on April 5, 2021.<sup>524</sup> USDA says it will announce the end date of the signup period later, but it will remain open for at least sixty days.<sup>525</sup>

The signup had previously closed on December 11, 2020.<sup>526</sup>

In general, an application submitted or postmarked after the end of the signup period will not be approved.<sup>527</sup> The application 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 says that once it announces a CFAP 2 application deadline, no late-filed applications will be accepted.<sup>529</sup>

### II. CFAP Application—Form AD-3117

Farmers may apply for CFAP 2 for any commodity that is currently eligible under the program.<sup>530</sup> The CFAP 2 Application is form AD-3117 and can be downloaded from USDA's website.<sup>531</sup>

### III. One Application—May be Revised by Farmer and FSA

Farmers should submit only one application for their entire operation.<sup>532</sup> The application can include any commodities that are then eligible. It may be revised later to add 2020 sales, production, or revenue, if applicable.<sup>533</sup> So, for example, a farmer can complete a CFAP 2 application for corn and soybeans, and later also amend the application to include beef cattle.

<sup>524</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, (March 23, 2021); USDA, CFAP FAQ, "When does the reopening of the CFAP 2 signup start and end?" (April 22, 2021).

<sup>525</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, (March 23, 2021); USDA, CFAP FAQ, "When does the reopening of the CFAP 2 signup start and end?" (April 22, 2021); USDA, After Identifying Gaps in Previous Aid, USDA Announces 'Pandemic Assistance for Producers' to Distribute Resources More Equitably (March 24, 2021), at: <https://www.fsa.usda.gov/state-offices/Minnesota/news-releases/2021/after-identifying-gaps-in-previous-aid-usda-announces-pandemic-assistance-for-producers-to-distribute-resources-more-equitably>.

<sup>526</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(a)(2)).

<sup>527</sup> CFAP 2 Handbook, page 2-14, para. 21.B, page 3-7, para. 51.E (April 14, 2021).

<sup>528</sup> CFAP 2 Handbook, page 3-3, para. 50.C, page 3-7, para. 51.E (April 14, 2021).

<sup>529</sup> CFAP 2 Handbook, page 2-14, para. 21.B, Exhibit 6 (April 14, 2021).

<sup>530</sup> USDA, Apply for Coronavirus Food Assistance Program 2, at: <https://www.farmers.gov/cfap/apply>. CFAP 2 Handbook, page 2-14, para. 21.B (April 14, 2021).

<sup>531</sup> The CFAP 2 Application, Form AD-3117 (January 19, 2021), as well as instructions for completing the application, are available at: <https://www.farmers.gov/cfap>.

<sup>532</sup> CFAP 2 Handbook, page 3-1, para. 50.A (April 14, 2021).

<sup>533</sup> CFAP 2 Handbook, page 3-1, para. 50.A, page 3-6, para 52.A (April 14, 2021).

A revision can also occur after an application was accepted and the payment disbursed, so long as it is revised before the application deadline.<sup>534</sup> Such a revision can correct production, sales, revenue or inventory that was reported in error in the original application, or it can add production, sales, revenue or inventory that was not included on the original application. Any revision to an already-approved and paid CFAP 2 application that increases the farmer's payment will require that the farmer provide a new signature on the application.<sup>535</sup>

As explained below, FSA can also revise a farmer's application in ways that adversely impact the farmer's payment.<sup>536</sup> If this happens, FSA is not required to get the farmer's signature. FSA must, however, notify the farmer in writing of the revision and provide the farmer with appeal rights.<sup>537</sup>

#### **IV. Farmer Self-Certification Required**

The CFAP 2 application largely involves farmer self-certification of information about the farming operation.<sup>538</sup> Information that is needed 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.<sup>539</sup> In addition, contract growers must self-certify their eligible 2019 and 2020 revenue.<sup>540</sup> USDA expects that farmers providing this information will need sales, inventory, revenue, and other records to complete the application.<sup>541</sup> This documentation will not need to be submitted with the application. Instead, the farmer self-certifies that the information is true, but the farmer must still keep the documentation they used when filling out the application for three years after the approval date of the application.<sup>542</sup> FSA has the authority to request that the farmer submit documentation used to support the farmer's application.<sup>543</sup>

Contract growers, however, must provide a copy of their contract when applying for CFAP 2.<sup>544</sup>

Two additional points should be made about farmer self-certification for CFAP 2.

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>545</sup> A farmer that

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<sup>534</sup> CFAP 2 Handbook, page 3-8, para. 52.A (April 14, 2021).

<sup>535</sup> CFAP 2 Handbook, page 3-8, para. 52.B (April 14, 2021).

<sup>536</sup> CFAP 2 Handbook, page 3-8, para. 52.C (April 14, 2021).

<sup>537</sup> If FSA's revision of a farmer's CFAP 2 application results in decreased acres for payment, FSA must send the farmer what it calls a "reduced payment letter" along with a copy of the revised application. See CFAP 2 Handbook, page 3-8, para. 52.C (April 14, 2021).

<sup>538</sup> See CFAP 2 Application, Form AD-3117 (January 19, 2021); CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021).

<sup>539</sup> CFAP 2 Handbook, page 3-4, para. 51.B, page 4-33, para. 97.A, page 5-32, para. 137.A-B, page 6-22, para. 177.A, page 7-23, para. 222.B (April 14, 2021).

<sup>540</sup> CFAP 2 Handbook, page 9-22, para. 312.A-B (April 14, 2021).

<sup>541</sup> CFAP 2 Handbook, page 2-51, para. 36.B, pages 3-4 and 3-5, para. 51.B, page 9-22, para. 312.A (April 14, 2021); USDA, CFAP FAQ, "What documents do I need to submit with my application?" (April 22, 2021).

<sup>542</sup> CFAP 2 Handbook, page 1-11, para. 3.G (April 14, 2021).

<sup>543</sup> CFAP 2 Handbook, page 2-1, para. 15.A, page 3-4, para. 51.B, page 4-33, para. 97.A (April 14, 2021).

<sup>544</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4882-4883 (January 19, 2021) (to be codified at 7 C.F.R. § 9.202(c)); CFAP 2 Handbook, page 2-1, para. 15.A, page 9-21, para. 311.A (April 14, 2021).

<sup>545</sup> USDA says it is the farmer's responsibility to be aware of the program and to accurately report required information on the application form. See CFAP 2 Application, Form AD-3117, Part J

intentionally represents as true information that the farmer knows or believes is not true is possibly subject to criminal and civil fraud statutes.<sup>546</sup>

Second, USDA says it will use spot checks of farmer applications.<sup>547</sup> In the spot checks, USDA will ask for documentation that was used for the CFAP application.<sup>548</sup> USDA expects farmers to keep documents that were used for the application.<sup>549</sup> If the farmer provided inaccurate information on the CFAP application, the farmer may need to refund some of the payment.<sup>550</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, sales or production, the application may be disapproved and the farmer may need to refund the money with interest.

## **V. Ways to Apply—Online, Manually, Through Local FSA Office**

According to USDA, farmers should apply through their local FSA office—sometimes called a USDA Service Center.<sup>551</sup> The CFAP 2 application can be submitted in-person (when available), by mail, email, or fax.<sup>552</sup> Some farmers may be able to submit their CFAP 2 application online.<sup>553</sup> Other authorized methods may also be allowed.<sup>554</sup>

The USDA website previously provided what it called a CFAP 2 “Application Generator and Payment Calculator.” This was an Excel workbook that allowed farmers to input the required information about the farm's production, and that information is then automatically transferred into the CFAP 2 application, form AD-3117, which the farmer could then print and sign. The Application Generator and Payment Calculator is no longer discussed on the main USDA CFAP website so it might be that it is no longer in effect or is outdated.

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(January 19, 2021); CFAP 2 Handbook, page 1-11, para. 3.G, page 1-12, para. 4.B (April 14, 2021); USDA, CFAP FAQ, “What documents do I need to submit with my application?” (April 22, 2021).

<sup>546</sup> CFAP Handbook, page 1-12, para. 4.A-B (April 14, 2021); USDA, CFAP FAQ, “What documents do I need to submit with my application?” (April 22, 2021).

<sup>547</sup> CFAP 2 Handbook, pages 3-4 and 3-5, para. 51.B (April 14, 2021).

<sup>548</sup> CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021); USDA, CFAP FAQ, “What documents do I need to submit with my application?” (April 22, 2021).

<sup>549</sup> For examples of supporting documentation that farmers may need, see CFAP 2 Handbook, pages 3-4 and 3-5, para. 51.B (April 14, 2021).

<sup>550</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,382 (September 22, 2020) (prefatory comments); CFAP 2 Handbook, page 1-12, para. 4.A (April 14, 2021).

<sup>551</sup> See CFAP 2 Handbook, page 2-14, para. 21.B (April 14, 2021). See also USDA, CFAP FAQ, “Do all producers need to apply through the Farm Service Agency?” (April 22, 2021). The regulations, however, state that CFAP 2 applications may be submitted to “any FSA county office.” See CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,382, 59,385 (September 22, 2020) (prefatory comments; to be codified at 7 C.F.R. § 9.4(a));

<sup>552</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,382, 59,385 (September 22, 2020) (prefatory comments; to be codified at 7 C.F.R. § 9.4(a)); CFAP 2 Handbook, page 2-14, para. 21.B, page 3-1, para. 50.A (April 14, 2021).

<sup>553</sup> To apply for CFAP 2 online, farmers need to have what is called a “Level 2 eAuthentication” account with FSA. Farmers can register for this account at [www.eauth.usda.gov](http://www.eauth.usda.gov). CFAP 2 Handbook, page 3-1, para. 50.A (April 14, 2021). Farmers who are applying for CFAP 2 for acreage-based crops will only be able to apply online if they have a form FSA-578 (Report of Acreage) already on file with FSA. See CFAP 2 Handbook, page 8-4, para. 251.A-C (April 14, 2021).

<sup>554</sup> CFAP 2 Handbook, page 3-1, para. 50.A (April 14, 2021). According to the CFAP 2 Handbook, any additional methods for submitting applications will be posted on [www.farmers.gov](http://www.farmers.gov).



## **VI. 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>555</sup> USDA says that employees will be ready to assist farmers with one-on-one support for their CFAP 2 application if they call the call center.

## **VII. 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>556</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 interaction is by phone, FSA must provide the receipt for service when that business request is made over the phone.<sup>557</sup> Farmers working with FSA to apply for CFAP should receive receipts for service from USDA.

## **VIII. USDA Process for Reviewing CFAP Applications**

USDA will review the CFAP 2 application that the farmers submits.

### **A. Self-Certified by Farmer**

As noted above, the CFAP application asks for information about the farmer's production, sales, inventories, revenue, and acreage.<sup>558</sup> That information is self-certified by the farmer.

### **B. USDA Reviews to See if Application is “Reasonable” and “Accurate”**

USDA says it will look to see if the information on the CFAP 2 application is reasonable and accurate.<sup>559</sup> The review will be based on the application itself.<sup>560</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 signup period.<sup>561</sup> The local USDA office will also review the production, sales, and inventory information provided on the application.

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<sup>555</sup> USDA says that any farmer who wishes to speak with a USDA employee and get assistance with the CFAP 2 application should call 1-877-508-8364. See USDA, Coronavirus Food Assistance Program 2, Assistance with Applying (May 31, 2021), at: <https://www.farmers.gov/cfap>.

<sup>556</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>557</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>558</sup> CFAP 2 Handbook, page 2-51, para. 36.A, page 3-4, para. 51.B (April 14, 2021).

<sup>559</sup> CFAP 2 Handbook, page 3-6, para. 51.D (April 14, 2021).

<sup>560</sup> CFAP 2 Handbook, page 3-6, para. 51.C (April 14, 2021).

<sup>561</sup> CFAP 2 Handbook, page 2-14, para. 21.B, page 3-6, para. 51.C-D (April 14, 2021).

### **C. 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>562</sup>

When a farmer signs the CFAP 2 application, the farmer agrees to give USDA “all information that is necessary to verify that the information on the form is accurate.”<sup>563</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>564</sup>

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

### **D. 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.

#### **1. Approve Application**

The local USDA office can approve the CFAP 2 application.<sup>565</sup>

#### **2. Make “Adjustments”**

USDA may make “adjustments” to the information that is reported on the application based on information that the farmer gives USDA.<sup>566</sup> These adjustments, according to USDA rules, should be based on documentation. An adjustment can result in a lower payment.

For contract growers, USDA may adjust the revenue numbers for both 2019 and 2020.<sup>567</sup> The adjustment can be made if USDA decides that the revenue numbers are unreasonable or inaccurate. Revenue numbers may also be adjusted to reflect the actual 2019 or 2020 revenue, based on documentation, if USDA thinks the adjustment is necessary.<sup>568</sup>

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<sup>562</sup> CFAP 2 Handbook, page 3-4, para. 51.B, page 3-7, para. 51.E (April 14, 2021).

<sup>563</sup> CFAP 2 Application, Form AD-3117, Part A (January 19, 2021); CFAP 2 Handbook, page 3-2, para. 50.B (April 14, 2021).

<sup>564</sup> CFAP 2 Handbook, page 2-51, para. 36.B, page 3-4, para. 51.B (April 14, 2021).

<sup>565</sup> CFAP 2 Handbook, page 3-6, para. 51.C-D (April 14, 2021).

<sup>566</sup> CFAP 2 Handbook, page 3-4, para. 51.B, page 3-7, para. 51.E (April 14, 2021).

<sup>567</sup> CFAP 2 Handbook, page 9-22, para. 312.D (April 14, 2021).

<sup>568</sup> CFAP 2 Handbook, page 9-22, para. 312.D (April 14, 2021).

### 3. Deny Application

USDA can deny the application—the official term is disapprove the application.<sup>569</sup> USDA can deny the application if it decides the information on the application, or in the supporting documents provided by the farmer, is not accurate or reasonable.

USDA can also deny the application if: (1) the program eligibility rules are not met; (2) the producer is not eligible; (3) there is evidence that the farmer did not have an ownership interest in the commodity; (4) the application was late; or (5) the application was not properly signed.<sup>570</sup> The CFAP application is not considered filed with USDA unless it is signed.

### 4. Notice and Appeal Rights if Application is Adjusted or Denied

If the CFAP 2 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>571</sup>

Second, USDA must notify the farmer that the farmer may appeal the decision.<sup>572</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>573</sup> This information can become important if the farmer appeals the USDA decision.

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<sup>569</sup> CFAP 2 Handbook, page 1-8, para. 3.D, page 3-7, para. 51.E (April 14, 2021).

<sup>570</sup> CFAP 2 Handbook, page 3-8, para. 51.E (April 14, 2021). The signature must be on Form AD-3117, in part J. Signature rules are discussed in FSA Handbook Common Management and Operating Provisions, 1-CM (Revision 3), pages 25-1 to 25-15, paras. 676 to 681 (January 2, 2020).

<sup>571</sup> CFAP 2 Handbook, page 3-7, para. 51.E (April 14, 2021).

<sup>572</sup> CFAP 2 Handbook, page 3-7, para. 51.E (April 14, 2021).

<sup>573</sup> CFAP 2 Handbook, page 3-7, para. 51.E (April 14, 2021).

## **Chapter Six: Required Eligibility Forms, Supporting Documentation, and Additional Forms**

A number of forms and considerable supporting documentation are required for CFAP 2.

### **I. Required Eligibility Forms**

There are several forms that farmers must submit in order to be eligible for CFAP 2.<sup>574</sup> USDA calls these forms required eligibility forms. A CFAP 2 payment will not be issued until each of the required eligibility forms is submitted.<sup>575</sup>

Each of these eligibility forms must be submitted within sixty days from the date on which the farmer signs the CFAP 2 application.<sup>576</sup> If they are not submitted within this timeframe, the farmer may receive a reduced payment or no payment at all.

The following are the eligibility forms a farmer must submit in order to receive a CFAP 2 payment.

#### **A. CFAP 2 Application (Form AD-3117)**

As described in more detail above, to be eligible for CFAP 2 the farmer must submit a completed and signed application, Form AD-3117.<sup>577</sup>

#### **B. Farm Operating Plan (Form CCC-902)**

A farm operating plan must be submitted.<sup>578</sup> This is known as Form CCC-902. It must be submitted within sixty days of signing the CFAP 2 application.<sup>579</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.

<sup>574</sup> CFAP 2 Handbook, page 2-12, para. 20.A (April 14, 2021).

<sup>575</sup> CFAP 2 Handbook, page 2-52, para. 37.A, page 3-29, para. 68.B (April 14, 2021).

<sup>576</sup> CFAP 2 Handbook, page 2-12, para. 20.A, page 3-6, para. 51.D (April 14, 2021). See, as well, CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,827, 30,831 (May 21, 2020) (prefatory comments; to be codified at 7 C.F.R. § 9.4(b)).

<sup>577</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,382, 59,385 (September 22, 2020) (prefatory comments; to be codified at 7 C.F.R. § 9.4(a)); CFAP 2 Handbook, page 2-52, para. 37.A, page 3-1, para. 50.A, page 3-7, para. 51.E (April 14, 2021).

<sup>578</sup> CFAP 2 Application, Form AD-3117, Part A (January 19, 2021); CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(1)); CFAP 2 Handbook, page 2-12, para. 19.A, page 2-52, para. 37.A, page 3-6, para. 51.D (April 14, 2021). Form CCC-902 must be completed according to the Payment Eligibility Handbook, 5-PL. 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).

<sup>579</sup> If not signed within the sixty-day timeframe, payment may be reduced or denied. CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(b)(1)); CFAP 2 Handbook, page 2-12, para. 20.A (April 14, 2021).

For CFAP 2 purposes, only parts A and B of Form CCC-902 are required.<sup>580</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.

The USDA website says that USDA staff will help applicants complete the required parts of Form CCC-902.<sup>581</sup>

### **C. Average Adjusted Gross Income Statements (Form CCC-941 and, if Applicable, Form CCC-942)**

Farmers applying for CFAP 2 must certify their average adjusted gross income (AGI).<sup>582</sup> There are two potential forms that may be required to meet this requirement.<sup>583</sup> First, a farmer must submit an Average Adjusted Gross Income Certification, form CCC-941, which provides a certification of AGI and a consent to tax disclosure.<sup>584</sup> If a farmer's income is more than the average AGI limitations for CFAP 2, a farmer should also submit a Certification of Income from Farming, Ranching, and Forestry.<sup>585</sup> This is known as Form CCC-942.<sup>586</sup>

<sup>580</sup> CFAP 2 Application, Form AD-3117, Part A (January 19, 2021); CFAP 2 Handbook, page 2-12, para. 19.A (April 14, 2021). 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 2, ask for information about the land to be used, including the farm number, equipment, labor, source of capital, and management of the farm.

<sup>581</sup> See USDA, Coronavirus Food Assistance Program 2, CFAP 2 Application (May 31, 2021), at: <https://www.farmers.gov/cfap>.

<sup>582</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(b)(3)-(4)); CFAP 2 Handbook, page 2-9, para. 17.A, page 2-52, para. 37.A (April 14, 2021). Tax years 2016, 2017, and 2018 are used to calculate AGI for 2020 CFAP 2. 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>583</sup> USDA, CFAP FAQ, "Who must fill out forms to certify average AGI and Farm AGI?" (April 22, 2021).

<sup>584</sup> Form CCC-941 is available in English at: <https://www.farmers.gov/cfap/apply>. For this requirement, see CFAP 2 Application, Form AD-3117, Part A (January 19, 2021); CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(b)(3)); CFAP 2 Handbook, page 2-9, para. 17.A, page 2-52, para. 37.A (April 14, 2021). 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>585</sup> For this requirement, see CFAP 2 Application, Form AD-3117, Part A (January 19, 2021); CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(4)); CFAP 2 Handbook, page 2-12, para. 19.A, page 2-52, para. 37.A (April 14, 2021).

<sup>586</sup> A downloadable copy of form CCC-942, with instructions, is available at: <https://www.farmers.gov/cfap/apply>.

## **D. 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>587</sup> This form, known as CCC-901, collects information on legal entities.<sup>588</sup> Form CCC-901 collects contact information on members, including citizenship status, as well as Tax Identification Numbers.

## **E. 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>589</sup> This is true for CFAP 2, although the rules that apply are a bit unusual.<sup>590</sup> When applying for CFAP, the application requires that farmers agree to comply with certain conservation compliance rules.<sup>591</sup>

The following sections explain the conservation compliance rules for CFAP 2.

### **1. Form AD-1026**

Generally, farmers meet the conservation compliance requirements for various USDA programs by completing Form AD-1026.<sup>592</sup> That often also means providing documentation about the farmland.<sup>593</sup>

Some farmers will only need to certify their conservation compliance on the CFAP 2 application, while other farmers may need to fill out part or all of Form AD-1026 when applying.<sup>594</sup> As with the other required eligibility forms for CFAP 2, if Form AD-1026 is required, a farmer must submit it within sixty days of signing the CFAP 2

<sup>587</sup> CFAP 2 Application, Form AD-3117, Part A (January 19, 2021); CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(b)(2)); USDA, Apply for Coronavirus Food Assistance Program 2, Additional Application Materials (May 31, 2021), at: <https://www.farmers.gov/cfap/apply>.

<sup>588</sup> Form CCC-901 is available at: <https://www.farmers.gov/cfap/apply>. 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>589</sup> USDA, CFAP FAQ, “Do the Farm Bill’s conservation compliance requirements apply to CFAP?” (April 22, 2021). 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>590</sup> CFAP 2 Application, Form AD-3117, Part A (January 19, 2021); CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021).

<sup>591</sup> CFAP 2 Handbook, pages 2-10 and 2-11, para. 18.A (April 14, 2021). On the CFAP 2 application, the conservation compliance sections are found at Form AD-3117, Part A, numbers 8, 8A, 8B, and 9 (January 19, 2021).

<sup>592</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)); CFAP 2 Handbook, page 2-12, para. 19.B, page 2-52, para. 37.A (April 14, 2021). The rules for this form are in FSA Handbook, Highly Erodible Land Conservation and Wetland Conservation Provisions, 6-CP (Revision 4) (June 21, 2019). Form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification, is available in English and Spanish, at: <https://www.farmers.gov/cfap/apply>.

<sup>593</sup> Highly Erodible Land Handbook, 6-CP, page 6-122, para. 641.D (June 21, 2019).

<sup>594</sup> See CFAP 2 Application, Form AD-3117, Part A (January 19, 2021); CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)); CFAP 2 Handbook, pages 2-10 and 2-11, para. 18.A (April 14, 2021).

application.<sup>595</sup> If the farmer does not meet this deadline, the farmer's CFAP 2 payment may be reduced or denied.<sup>596</sup>

## **2. Farmers That Already Have a Certified Form AD-1026 on File**

Some farmers have an ongoing certification of conservation compliance. Once a Form AD-1026 is certified by USDA, it remains in effect.<sup>597</sup> FSA calls this continuous certification. Even with continuous certification, farmers must complete a new Form AD-1026 if certain changes are made to the farming operation.<sup>598</sup>

Most rules for continuous certification are applicable to farmers applying for CFAP 2.<sup>599</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 2.

## **3. Farmers That Must Only Complete Part of Form AD-1026**

Some farmers will not need to fill out the entire Form AD-1026.<sup>600</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>601</sup> Farm numbers are discussed more below.

### ***a. 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>602</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>603</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

<sup>595</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,831 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(b)(5)); CFAP 2 Handbook, page 2-12, para. 20.A, page 3-6, para. 51.D (April 14, 2021).

<sup>596</sup> CFAP 2 Handbook, page 3-6, para. 51.D (April 14, 2021).

<sup>597</sup> See Highly Erodible Land Handbook, 6-CP, page 3-8.6, para. 303.E (June 21, 2019); CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021); Form AD-1026, Part D.

<sup>598</sup> See Highly Erodible Land Handbook, 6-CP, page 3-8.6, para. 303.E (June 21, 2019); Form AD-1026, Part D.

<sup>599</sup> CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021).

<sup>600</sup> CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021). The farmer would only need to complete Part A and Part D of Form AD-1026, and check box 5B.

<sup>601</sup> Highly Erodible Land Handbook, 6-CP, page 6-122, para. 641.D (June 21, 2019); CFAP 2 Handbook, page 2-11, para. 18.A (April 14, 2021).

<sup>602</sup> CFAP 2 Application, AD-3117, Part A (January 19, 2021). On Form AD-1026 that means the farmer checks box 5A. See CFAP 2 Handbook, page 2-11, para. 18.A (April 14, 2021).

<sup>603</sup> Form AD-1026, Part A, Item 5A.



produced from the tillage of land.<sup>604</sup> Under this exception, USDA has in mind farmers that keep bees on someone else's land but do not rent the land.<sup>605</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.

If a farmer meets this exception, the farmer must only fill out a portion of Form AD-1026 in order to participate in CFAP 2.<sup>606</sup>

***b. Perennial Crops and No Farm Program Payments Except for CFAP 2***

Farmers will only need to fill out part of Form AD-1026 if they can certify that three things are true.<sup>607</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 2 or federal crop insurance.<sup>608</sup>

Second, the farmer must be able to certify that the farmer only has interest in land that produces perennials.<sup>609</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>610</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>611</sup> Perennial crops, for this purpose, do not include sugar cane.<sup>612</sup>

Third, the farmer must be able to certify that the farmer has not converted a wetland after December 23, 1985.<sup>613</sup>

<sup>604</sup> Form AD-3117, Part A, Item 8B (January 19, 2021); see also CFAP 2 Handbook, page 2-11, para. 18.A (April 14, 2021).

<sup>605</sup> Form AD-1026, Part A, Item 5A.

<sup>606</sup> The farmer must check Box 5A of Form AD-1026 as well as self-certify compliance with the conservation rules. See CFAP 2 Handbook, page 2-11, para. 18.A (April 14, 2021); CFAP 2 Application, AD-3117, Part A, Items 8B, 9 (January 19, 2021).

<sup>607</sup> Farmers that meet these requirements must check Box 5B on Form AD-1026 as well as self-certify compliance with the conservation rules. See CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021); CFAP 2 Application, AD-3117, Part A, Items 8A, 9 (January 19, 2021).

<sup>608</sup> Form AD-1026, section 5; CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021).

<sup>609</sup> CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021); 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>610</sup> Form AD-1026, Appendix, no. 3.

<sup>611</sup> CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021); Form AD-1026, Part A, Section 5.

<sup>612</sup> CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021).

<sup>613</sup> CFAP 2 Handbook, page 2-10, para. 18.A (April 14, 2021); Form AD-1026, Part A, Section 5. The CFAP 2 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.



#### 4. Farmers That 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 2 and do not qualify for either of the two above exceptions.<sup>614</sup>

Usually, filling out a complete Form AD-1026 would require additional documents and would mean establishing farm records.<sup>615</sup> Establishing a farm record means the farmer must receive a farm number from USDA.<sup>616</sup>

For CFAP 2, however, 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>617</sup> It is unclear whether FSA will require farmers to create a farm record in order to receive a CFAP 2 payment.

## II. Supporting Documentation

As noted above, although farmers self-certify their CFAP 2 applications, in some cases USDA will request that a farmer provide additional supporting documentation to verify the information given on the CFAP 2 application.<sup>618</sup> This can occur if USDA thinks that the application is not reasonable or is questionable.<sup>619</sup>

If USDA requests additional documentation to substantiate the production, sales, revenue, or inventories for any of the commodities on a farmer's application, and the farmer does not submit that additional documentation, USDA may adjust the application or disapprove it.<sup>620</sup> A disapproval means a denial.

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

### A. 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>621</sup>

<sup>614</sup> CFAP 2 Handbook, page 2-11, para. 18.A (April 14, 2021); CFAP 2 Application, AD-3117, Part A. Item 8 (January 19, 2021). When filling out form AD-1026, farmers must follow the rules in the Highly Erodible Land Handbook, 6-CP (June 21, 2019).

<sup>615</sup> Highly Erodible Land Handbook, 6-CP, page 6-122, para. 641.D (June 21, 2019).

<sup>616</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>617</sup> CFAP 2 Handbook, page 2-11, para. 18.A (April 14, 2021).

<sup>618</sup> CFAP 2 Application, Form AD-3117, Part A (January 19, 2021); CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,382 (September 22, 2020) (prefatory comments); CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(c)); CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021).

<sup>619</sup> CFAP 2 Handbook, pages 3-4 and 3-5, para. 51.B, page 3-7, para. 51.E, page 9-22, para. 312.A (April 14, 2021).

<sup>620</sup> CFAP 2 Handbook, page 3-4 para. 51.B (April 14, 2021).

<sup>621</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020), amended by amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(c)(1)).

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.<sup>622</sup>

## **B. 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>623</sup>

## **C. 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>624</sup>

## **D. Verification of Information Provided on Application**

If requested by USDA, a farmer must provide documentation that substantiates the information provided on the farmer's CFAP 2 application.<sup>625</sup> For example, the sales of specialty crops, aquaculture, nursery and floriculture, and "other" livestock must be based on sales records. Production for various commodities, including dairy, eggs, and broilers, must be based on production records. Similarly, a farmer's inventory for livestock 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, production, sales, revenue, and acreage for specific commodities.

### **1. Dairy—Cow's Milk**

According to USDA, the following are examples of production evidence for dairy: (1) milk marketing statements for April, May, June, July, and August 2020; (2) records documenting that milk was dumped in April, May, June, July, and August 2020.<sup>626</sup>

USDA says it will also accept other records that it decides are acceptable.<sup>627</sup>

### **2. Eggs**

For eggs, the following are examples of production evidence that can provide supporting documentation: (1) egg marketing statements from 2019; (2) contracts; and

<sup>622</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020), amended by amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(c)(1)).

<sup>623</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020), amended by amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(c)(2)).

<sup>624</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,832 (May 21, 2020), amended by amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.4(c)(3)).

<sup>625</sup> CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,382 (September 22, 2020) (prefatory comments); CFAP 2 Handbook, pages 3-4 and 3-5, para. 51.B (April 14, 2021).

<sup>626</sup> CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021).

<sup>627</sup> CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021).

(3) sales receipts.<sup>628</sup> If the egg farmer was a new producer after December 19, 2019, the farmer can use 2020 documentation.

USDA will also accept other records that it decides are acceptable.<sup>629</sup>

### 3. Broilers

For broilers, the following are examples of production evidence that can provide supporting documentation: (1) broiler marketing statements from 2019; (2) contracts; and (3) sales receipts.<sup>630</sup> If the broiler farmer was a new producer after December 31, 2019, the farmer can use 2020 documentation.

USDA will also accept other records that it decides are acceptable.<sup>631</sup>

### 4. Livestock

For livestock, USDA gives examples of sources of evidence that would be acceptable to USDA to verify a farmer's owned inventory.<sup>632</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>633</sup>

For inventory in particular, USA says examples of evidence for verification purposes include: (1) livestock purchase receipts; (2) veterinarian records; (3) records that verify livestock production costs; and (4) contemporaneous diaries that are acceptable to USDA.<sup>634</sup> Contemporaneous means that the diary was written at the time the events took place.

As noted below, USDA has the power to adjust the livestock inventory listed on the farmer's application if USDA decides the quantity is unreasonable or not accurate.<sup>635</sup> USDA can also change the inventory based on the documents the farmer gives to USDA.

### 5. Sales Commodities

For sales commodities—including specialty crops, aquaculture, nursery and floriculture, “other” livestock, and certain miscellaneous commodities—USDA gives examples of the supporting documentation to verify production.<sup>636</sup> They include: (1) schedule F; (2) sales receipts; (3) other sales documents indicating when a commodity was forward priced; (4) ledgers of income; (5) income statements and deposit slips; (6) register tapes; (7) invoices for custom harvesting; (8) records verifying production costs; (9) truck sale tickets; and (10) crop insurance, NAP, and WHIP+ records.

<sup>628</sup> CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021).

<sup>629</sup> CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021).

<sup>630</sup> CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021).

<sup>631</sup> CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021).

<sup>632</sup> CFAP 2 Handbook, page 3-5, para. 51.B (April 14, 2021).

<sup>633</sup> CFAP 2 Handbook, page 3-5, para. 51.B (April 14, 2021).

<sup>634</sup> CFAP 2 Handbook, page 6-22, para. 177.A (April 14, 2021).

<sup>635</sup> CFAP 2 Handbook, page 6-23, para. 177.C (April 14, 2021).

<sup>636</sup> CFAP 2 Handbook, page 3-5, para. 35.B (April 14, 2021).

USDA will also accept contemporaneous diaries that USDA decides are acceptable, as well as contemporaneous measurements.<sup>637</sup> Contemporaneous means that the diary was written at the time the events took place. A contemporaneous measurement of inventory for October 1, for example, would be a measurement that took place on October 1, and was not estimated later.

In addition, USDA says it will accept other records that it thinks are acceptable.<sup>638</sup>

If the farmer was a new producer after December 31, 2019, the farmer may provide 2020 documentation.<sup>639</sup>

## **6. Contract Grower Commodities**

For contract growers of swine or poultry, USDA says that contract grower agreements, ledgers of commerce, income or revenue statements, and reports issued by the owners of the commodity can be used as supporting documentation.<sup>640</sup>

In addition, MISC-1099 forms from 2019 and 2020 are a source of documentation for contract producers.<sup>641</sup> USDA notes that these forms document calendar year income.<sup>642</sup> For CFAP 2, the period for revenue losses does not quite match the calendar year. Revenue to be certified by the farmer is from January 1 through December 27. Revenue received between December 28 and December 31 in either year is not relevant for CFAP 2.

USDA says that contract grower agreements, ledgers of commerce, income or revenue statements, and reports issued by the owners of the commodity can be used as supporting documentation for contract growers.<sup>643</sup>

USDA may also accept other records that it decides are acceptable.<sup>644</sup>

## **III. Additional Forms**

The following forms may also be needed in order to complete the CFAP 2 application.

### **A. Customer Contact Information (Form AD-2047)**

USDA may require that farmers submit form AD-2047, which provides basic customer contact information.<sup>645</sup>

<sup>637</sup> CFAP 2 Handbook, page 3-5, para. 51.B (April 14, 2021).

<sup>638</sup> CFAP 2 Handbook, page 3-5, para. 51.B (April 14, 2021).

<sup>639</sup> CFAP 2 Handbook, page 3-5, para. 51.B (April 14, 2021).

<sup>640</sup> CFAP 2 Handbook, page 3-5, para 51.B (April 14, 2021).

<sup>641</sup> CFAP 2 Handbook, page 3-5, para 51.B (April 14, 2021).

<sup>642</sup> CFAP 2 Handbook, page 3-5, para 51.B (April 14, 2021).

<sup>643</sup> CFAP 2 Handbook, page 3-5, para 51.B (April 14, 2021).

<sup>644</sup> CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021).

<sup>645</sup> Form AD-2047 is available at: <https://www.farmers.gov/cfap/apply>.

**B. 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 2 requirements for producer, payment limitations, and foreign person eligibility.<sup>646</sup> This is known as form CCC-903.

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

If farmers wish to receive a CFAP 2 payment by direct deposit, they should complete form SF-3881, which provides the needed banking and direct deposit information.<sup>647</sup>

**D. 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>648</sup> This certification is completely optional.<sup>649</sup> According to an FSA Notice released in May 2020, the information on form CCC-860 does not affect eligibility for CFAP 1 or impact a farmer's potential CFAP 1 payment in any way. This is probably true for CFAP 2 eligibility and payments as well, though FSA has not said so directly.

**IV. Spot Checks**

USDA says it will do some spot checks of farmers to confirm that information given to USDA is accurate.<sup>650</sup>

How spot checks will work is unclear. For CFAP 1, USDA says that the national FSA office will randomly select CFAP 1 applications for spot checks.<sup>651</sup> In addition, local USDA officials can select some applications to be spot checked by the national FSA office. It appears that USDA expects local offices to request national office spot checks of applications where the local office questions the validity of the farmer certification. The odd aspect of this is that local offices would have had the chance to ask the farmer for documentation for the CFAP 1 application, and the spot checks will be for CFAP 1 applications that have already been approved.

There is no guarantee that spot checks for CFAP 2 will work the same way as spot checks for CFAP 1.

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<sup>646</sup> CFAP 2 Handbook, page 2-12, para. 19.A (April 14, 2021).

<sup>647</sup> Form SF-3881 is available at: <https://www.farmers.gov/cfap/apply>.

<sup>648</sup> Form CCC-860 is available at:

[https://forms.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/CCC0860\\_140402Vo1.pdf](https://forms.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/CCC0860_140402Vo1.pdf).

<sup>649</sup> FSA Notice CFAP-4, page 18, para. 6.B (May 20, 2020).

<sup>650</sup> CFAP 2 Handbook, page 3-4, para. 51.B (April 14, 2021); USDA, CFAP FAQ, "What documents do I need to submit with my application?" (April 22, 2021).

<sup>651</sup> FSA Notice CFAP-12, Compliance Reviews of Coronavirus Food Assistance Program (CFAP) Applications (October 15, 2020).

## **V. Keep Documents for Three Years**

Farmers who are approved for a CFAP 2 payment must keep the documentation used in support of their application for three years after the date of approval.<sup>652</sup> This includes documentation of production, sales, inventory, and acreage.<sup>653</sup>

## **VI. Farm Numbers**

As it stands right now, USDA says it is not requiring farmers to establish a farm number with FSA in order to apply for CFAP. For many other USDA programs, a farm number is required. In general, a farm number is a number that can be assigned by FSA when the land is part of a single farming operation, although it is possible for land with different owners to be combined into a single farm.<sup>654</sup>

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<sup>652</sup> CFAP 1 Rule, 85 Fed. Reg. 30,825, 30,834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.6(a)); CFAP 2 Handbook, page 1-11, para. 3.G (April 14, 2021).

<sup>653</sup> CFAP 2 Handbook, page 2-51, para. 36.B (April 14, 2021).

<sup>654</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).

## Chapter Seven: Modifying Existing CFAP 2 Applications

As discussed throughout this Guide, there have been various recent changes to CFAP 2. Some of these changes may affect farmers who previously applied to CFAP 2 during the original signup period that ran from September 21, 2020, through December 11, 2020. Some changes to CFAP 2 will require that farmers modify their existing CFAP 2 applications in order to take advantage of the new rules.<sup>655</sup> Other changes, such as the increased payment rate of twenty dollars per acre for price trigger and flat-rate crops, will not require any additional action on the part of farmers.<sup>656</sup>

The sections below describe which farmers may be eligible to modify an existing CFAP 2 application. If eligible, USDA says that farmers should contact their local USDA Service Center to begin the modification process.<sup>657</sup>

### I. Farmers Who Previously Applied for Sales-Based Commodities and Received Indemnities in 2019

Farmers who raised sales-based crops can amend already-submitted CFAP 2 applications to include additional income listed in their 2019 crop year sales.<sup>658</sup> This is helpful because benefits are based in part on the amount of those sales. Specifically, income can be added to 2019 crop sales from: (1) federal crop insurance indemnities; (2) Noninsured Crop Disaster Assistance Program (NAP) payments, and (3) Wildfire and Hurricanes Indemnity Program Plus (WHIP+) payments.<sup>659</sup> The payments must have been for crop year 2019.<sup>660</sup>

### II. Farmers Who Raise Pullets or Grow Turfgrass Sod

Farmers who raise pullets or grow turfgrass sod can amend already-submitted CFAP 2 applications to include those commodities.<sup>661</sup>

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<sup>655</sup> See, for example, USDA, Modify Existing CFAP 2 Application (May 31, 2021).

<sup>656</sup> For example, USDA says it will automatically issue new payments for farmers who previously submitted a CFAP 2 application for price trigger or flat-rate crops. See FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, page 2 (March 23, 2021).

<sup>657</sup> Local service centers may be found at: <https://www.farmers.gov/service-center-locator>.

<sup>658</sup> CFAP 2 Handbook, page 2-14, para. 21.B, page 3-8, para. 52.B (April 14, 2021); USDA, CFAP FAQ, "I grow or raise a CFAP 2 sales-based commodity that suffered a loss covered by crop insurance indemnity, NAP, or WHIP+ in crop year 2019. I applied for CFAP 2, and my payment calculation only included eligible sales. Can I revise my application to update how the payment is calculated?" (April 22, 2021); USDA, Modify Existing CFAP 2 Application (May 31, 2021).

<sup>659</sup> CFAP 2 Handbook, page 3-3, para. 5.B, page 3-7, para. 51.E, page 3-8, para. 52.B (April 14, 2021); USDA, CFAP FAQ, "I grow or raise a CFAP 2 sales-based commodity that suffered a loss covered by crop insurance indemnity, NAP, or WHIP+ in crop year 2019. I applied for CFAP 2, and my payment calculation only included eligible sales. Can I revise my application to update how the payment is calculated?" (April 22, 2021).

<sup>660</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021).

<sup>661</sup> USDA, CFAP FAQ, "I applied for CFAP 2, but I also raise pullets or grow turfgrass sod. Do I submit a new application or modify an existing one for payments on those newly eligible commodities?" (April 22, 2021).

### **III. Farmers Who Previously Applied for Price Trigger Commodities but Did Not Have a 2020 APH Approved Yield**

Farmers who raise price trigger crops may be able to amend already-submitted CFAP 2 applications. This is true if the farmer grows barley, corn, sorghum, soybeans, sunflowers, upland cotton, or wheat, and the farmer had crop insurance but did not have an available 2020 APH approved yield.<sup>662</sup> For some of these farmers, FSA is now using 100 percent of the 2019 ARC-CO benchmark yield, instead of the original 85 percent.<sup>663</sup> As described earlier in this Guide, 100 percent of the 2019 ARC-CO benchmark yield can be used if the farmer meets one of four conditions.<sup>664</sup> First, 100 percent of the weighted 2019 ARC-CO can be used if the farmer has coverage under certain types of federal crop insurance.<sup>665</sup> Second, it can be used if the farmer is a landlord and the landlord's share is insured by the tenant under an RMA policy or a plan of insurance. Third, it can be used if the farmer is a tenant and the farmer's share is insured by the landlord with federal crop insurance. Finally, it can be used if the farm is a joint venture and the crop is insured by a member under an RMA policy or plan of insurance.

### **IV. Contract Growers**

It is currently unclear whether farmers who previously applied for CFAP 2—and who would now also be eligible for a CFAP 2 payment as a contract grower—can modify their previous CFAP 2 application.<sup>666</sup>

<sup>662</sup> FSA Notice CFAP-15, Coronavirus Food Assistance Program (CFAP) Policy Updates, page 3 (March 23, 2021); USDA, Modify Existing CFAP 2 Application (May 31, 2021).

<sup>663</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks) (January 19, 2021); CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,387 (September 22, 2020) (to be codified at 7 C.F.R. § 9.202(a)(3)); CFAP 2 Handbook, page 8-3, para. 250.D, page 8-27, para. 262.A, pages 8-31 and 8-32, para. 262.F-G, pages 8-73 and 8-74, para. 284.C-D (April 14, 2021).

<sup>664</sup> CFAP Additional Assistance Rule, 86 Fed. Reg. 4877, 4879 (prefatory remarks), 4883 (to be codified at 7 C.F.R. § 9.203(a)(3)(i)(A)-(D)) (January 19, 2021); CFAP 2 Handbook, page 8-27, para. 262.A, page 8-30, para. 262.E (April 14, 2021).

<sup>665</sup> The qualifying crop insurance plans include Area Risk Protection Insurance Plan, Margin Protection Plan, Stacked Income Protection Plan, Supplemental Coverage Option, or Whole-Farm Revenue Protection Plan.

<sup>666</sup> USDA's Frequently Asked Questions discussion seems not to answer the question. See USDA, FAQ, "I raise swine and applied under CFAP Additional Assistance when it was announced in January 2021. Why haven't I received my additional payments for CFAP 1." USDA's answer to this question is: "The swine additional payments announced with the CFAP Additional Assistance remain on hold until further notice while the CFAP program is under review."



## Chapter Eight: CFAP 2 Appeals

Farmers have the right to appeal certain adverse decisions that USDA makes with respect to CFAP 2.<sup>667</sup> USDA programs, including CFAP 2, are required to inform farmers, in writing, of any adverse decision that is made with respect to the farmer.<sup>668</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>669</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.

### I. Appealable Adverse Decisions

In general, only adverse decisions are appealable.<sup>670</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>671</sup>

There are three main types of USDA adverse decisions that are appealable and that apply to CFAP 2. First, a farmer can appeal the denial of participation in certain programs, including CFAP 2.<sup>672</sup> Second, a farmer can appeal a decision related to the farmer's compliance with a program's requirements.<sup>673</sup> Third, a farmer can appeal a decision related to a program's payments or benefits.<sup>674</sup> With respect to CFAP 2 specifically, a farmer is also entitled to an appeal if FSA adjusts or disapproves any of the information on the farmer's CFAP 2 application.<sup>675</sup>

In order for any of these types of decisions to be appealable, it must result in an individual determination for the farmer.<sup>676</sup> In other words, the decision has to relate specifically to the

<sup>667</sup> CFAP 1 Rule, 85 Fed. Reg. 30825, 30834 (May 21, 2020), amended by CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,385 (September 22, 2020) (to be codified at 7 C.F.R. § 9.7(b)); CFAP 2 Rule, 85 Fed. Reg. 59,380, 59,382 (September 22, 2020) (prefatory comments); CFAP 2 Handbook, page 3-7, para. 51.E (April 14, 2021). The appeal regulations that apply to CFAP 2 are found at 7 C.F.R. pts. 11 and 780. Also applicable is 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\\_r02\\_a15.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-app_r02_a15.pdf).

<sup>668</sup> 7 C.F.R. § 11.6(b) (2020); FSA Handbook, 1-APP, page 2-8, para. 12.A (September 12, 2016).

<sup>669</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>670</sup> FSA Handbook, 1-APP, page 2-6, para. 11.A (September 12, 2016).

<sup>671</sup> 7 C.F.R. § 780.2, "Adverse decision" (2020).

<sup>672</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 1 Rule, 85 Fed. Reg. 30,825, 30,827 (prefatory remarks), 30834 (May 21, 2020) (to be codified at 7 C.F.R. § 9.7(b)); CFAP 2 Handbook, page 3-7, para. 51.E (April 14, 2021).

<sup>673</sup> 7 C.F.R. § 780.4(b)(2) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016).

<sup>674</sup> 7 C.F.R. § 780.4(b)(3) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016).

<sup>675</sup> CFAP 2 Handbook, page 3-7, para. 51.E (April 14, 2021).

<sup>676</sup> CFAP 1 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).

farmer and not be a decision that is generally applicable to other farmers.<sup>677</sup> Under CFAP 2, for example, if USDA decided that the production listed by the farmer on the CFAP 2 application was not accurate, that is an appealable decision. On the other hand, the decision by USDA not to include breeding stock as an eligible commodity for CFAP 2 is not appealable by a farmer that raises breeding stock because the decision by USDA applies to all farmers and not just that single farmer owning the breeding stock.

## II. 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>678</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>679</sup> With respect to CFAP 2, this means a farmer cannot appeal USDA's decision to include or exclude certain commodities from eligibility.<sup>680</sup> It also means a farmer cannot appeal the payment rates that USDA determined for each of the CFAP 2-eligible commodities.

In addition, farmers cannot appeal any statutory or regulatory requirements that apply to USDA programs.<sup>681</sup> This includes statutory or regulatory formulas that are used when calculating a farmer's potential payments or benefits under a program.<sup>682</sup>

Farmers also are unable to appeal the denial of program benefits due to a lack of funding.<sup>683</sup> Therefore, if CFAP 2 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>684</sup> If a farmer has a discrimination issue to raise, the farmer must follow the USDA discrimination complaint process, which is described below.

## III. 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 of the appeals options. An overview of each of these appeals options is described in the sections that follow.

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<sup>677</sup> 7 C.F.R. § 780.5(a)(1) (2020); FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

<sup>678</sup> 7 C.F.R. § 780.5(a)(1) (2020); CFAP 1 Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments); FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

<sup>679</sup> FSA Handbook, 1-APP, page 2-4, para. 10.A (September 12, 2016).

<sup>680</sup> CFAP 1 Rule, 85 Fed. Reg. 30825, 30827 (May 21, 2020) (prefatory comments).

<sup>681</sup> 7 C.F.R. § 780.5(a)(1) (2020); FSA Handbook, 1-APP, pages 2-6 and 2-7, para. 11.A-B (September 12, 2016).

<sup>682</sup> 7 C.F.R. § 780.5(a)(2) (2020); FSA Handbook, 1-APP, pages 2-6 and 2-7, para. 11.A-B (September 12, 2016).

<sup>683</sup> 7 C.F.R. § 780.5(a)(7) (2020); FSA Handbook, 1-APP, pages 2-6 and 2-7, para. 11.A-B (September 12, 2016).

<sup>684</sup> FSA Handbook, 1-APP, page 2-50, para. 27.A, page 6-3, para. 72.B (September 12, 2016).

### **A. Request Mediation**

If a farmer has been subject to an adverse decision, the farmer may request a mediation of that decision.<sup>685</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 the farmer received the written adverse determination. A farmer may only mediate the same adverse decision once.<sup>686</sup>

A farmer cannot request mediation if the farmer first seeks to appeal the decision through NAD.<sup>687</sup>

### **B. Request Reconsideration**

If a farmer has been subject to an adverse decision, the farmer may request reconsideration of that decision.<sup>688</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>689</sup>

### **C. 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>690</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.

### **D. 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>691</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.

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<sup>685</sup> 7 C.F.R. § 780.9 (2020); FSA Handbook, 1-APP, page 2-14, para. 14.E (September 12, 2016).

<sup>686</sup> 7 C.F.R. § 780.9(b) (2020).

<sup>687</sup> 7 C.F.R. § 780.7(a) (2020).

<sup>688</sup> 7 C.F.R. § 780.7 (2020); FSA Handbook, 1-APP, page 2-13, para. 14.C (September 12, 2016).

<sup>689</sup> 7 C.F.R. § 780.7(b) (2020); FSA Handbook, 1-APP, page 2-13, para. 14.C (September 12, 2016).

<sup>690</sup> 7 C.F.R. § 780.8 (2020); FSA Handbook, 1-APP, page 2-12, para. 14.B (September 12, 2016).

<sup>691</sup> 7 C.F.R. § 780.10 (2020); FSA Handbook, 1-APP, page 2-13, para. 14.D (September 12, 2016).

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>692</sup> The farmer may not, however, appeal to the county committee after having appealed to the state committee.

### **E. 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>693</sup> Although NAD is an organization within USDA, it is independent from all other offices and agencies within USDA.<sup>694</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>695</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>696</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>697</sup>

A NAD appeal is the final appeal within USDA that a farmer may make.<sup>698</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.

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<sup>692</sup> 7 C.F.R. § 780.10 (2020); FSA Handbook, 1-APP, page 2-13, para. 14.D (September 12, 2016).

<sup>693</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). See also 7 C.F.R. pts. 11 and 780.

<sup>694</sup> 7 C.F.R. § 11.2(a) (2020); FSA Handbook, 1-APP, page 6-1, para. 71.B (September 12, 2016).

<sup>695</sup> 7 C.F.R. § 11.6(b) (2020); FSA Handbook, 1-APP, page 6-7, para. 74.A (September 12, 2016).

<sup>696</sup> For more details on how a NAD appeal works, see FSA Handbook, 1-APP, pt. 6 (September 12, 2016).

<sup>697</sup> FSA Handbook, 1-APP, page 6-41, para. 81.A, page 6-57, para. 88.B (September 12, 2016).

<sup>698</sup> 7 C.F.R. § 11.3 (2020); FSA Handbook, 1-APP, page 2-15, para. 14.F (September 12, 2016).

## Chapter Nine: Discrimination is Illegal -- Filing a Complaint Against USDA

By law, USDA is prohibited from discriminating against the farmers it serves.<sup>699</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.

### I. 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>700</sup> USDA regulations add to that list: parental status, political beliefs, and gender identity.<sup>701</sup> USDA regulations say discrimination means the unlawful treatment or denial of benefits, services, rights or privileges.<sup>702</sup> Discrimination can mean being excluded from participation in programs or denial of benefits.

### II. 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>703</sup>

### III. Discrimination Complaint Form

USDA has a discrimination complaint form.<sup>704</sup> The complaint form is available online.<sup>705</sup> Farmers may also get a copy of the form by sending an email to USDA.<sup>706</sup> Otherwise, farmers may write USDA to get a copy of the form.<sup>707</sup>

<sup>699</sup> As USDA put it, "USDA prohibits discrimination against its customers." Filing a Program Discrimination Complaints as a USDA Customer, at: <https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer> (May 31, 2021).

<sup>700</sup> USDA OASCR, Filing a Program Discrimination Complaint as a USDA Customer (November 4, 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>.

<sup>701</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. 41406 (July 16, 2014) (codified at 7 C.F.R. part 15d).

<sup>702</sup> 7 C.F.R. § 15d.2, "Discrimination" (2020).

<sup>703</sup> USDA, Nondiscrimination Regulation § 7(a)(1) (October 5, 2015). See USDA OASCR, How to File a Program Discrimination Complaint (May 31, 2021), at: <https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint>.

<sup>704</sup> The complaint is form AD-3027, USDA Program Discrimination Complaint Form.

<sup>705</sup> USDA, Program Discrimination Complaint Form, AD-3027 (January 19, 2012), at <https://www.usda.gov/sites/default/files/documents/usda-program-discrimination-complaint-form.pdf>.

<sup>706</sup> To receive a complaint form by email, send a request to [OAC@usda.gov](mailto:OAC@usda.gov).

<sup>707</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

Alternatively, farmers can write a letter instead of using the official USDA complaint form.<sup>708</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>709</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>710</sup> Either the farmer or an authorized representative must sign the form or letter.

#### IV. Filing a Complaint

To file a complaint, a person can use one of several methods.<sup>711</sup> If the complaint goes to the wrong agency, the agency should forward it to OASCR within five calendar days of the date on which it was received.<sup>712</sup>

##### A. Mail

A farmer can mail the complaint to USDA at this address:<sup>713</sup>

U.S. Department of Agriculture  
Director, Center for Civil Rights Enforcement  
1400 Independence Avenue, SW  
Washington, DC 20250-9410

##### B. Fax

The complaint can be faxed to USDA at: (202) 690-7442.<sup>714</sup>

1400 Independence Avenue, SW  
Washington, DC 20250-9410

<sup>708</sup> 7 C.F.R. § 15d.2, "Complaint" (2020); USDA OASCR, Filing a Program Discrimination Complaint as a USDA Customer (November 4, 2020); USDA OASCR, Program Discrimination Complaint Filing: Frequently Asked Questions (May 31, 2021), at: <https://www.usda.gov/oascr/program-discrimination-complaint-filing>.

<sup>709</sup> See USDA Complaint Form, AD-3027 (January 19, 2012).

<sup>710</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 (May 31, 2021); USDA, Nondiscrimination Regulation § 5(f), "Complaint" (October 5, 2015).

<sup>711</sup> USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 31, 2021).

<sup>712</sup> USDA, Nondiscrimination Regulation § 7(a)(3) (October 5, 2015).

<sup>713</sup> USDA OASCR, How to File a Program Discrimination Complaint; USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "Where do I mail my program discrimination complaint?" (May 31, 2021).

<sup>714</sup> For specific details on what to include in the letter, see USDA, How to File a Program Discrimination Complaint (May 31, 2021).

### C. Email—With Signed Complaint Attached

The USDA website says farmers may use email to send in a complaint.<sup>715</sup> Complaints should be emailed to the following email address: [program.intake@usda.gov](mailto:program.intake@usda.gov). Farmers should make sure to attach a signed copy of the complaint to the email as well.<sup>716</sup>

### V. 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 the Office of the Assistant Secretary for Civil Rights (OASCR) at USDA.<sup>717</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>718</sup>

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>719</sup>

Farmers also can email USDA for help at [CR-INFO@ascr.usda.gov](mailto:CR-INFO@ascr.usda.gov).

### VI. 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>720</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

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<sup>715</sup> USDA Complaint Form, AD-3027 (January 19, 2012). At one point on the USDA website, USDA says that a complaint can be filed using email. See USDA, OASCR, Filing a Program Discrimination Complaint as a USDA Customer (May 31, 2021). At another place, however, USDA says that a program discrimination complaint may not be sent by email. See USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "Can I send my USDA program discrimination complaint to the Office of Adjudication by email?" (May 31, 2021).

<sup>716</sup> See USDA Complaint Form, AD-3027, page 1 (January 19, 2012).

<sup>717</sup> USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 31, 2021); USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "Who may I contact for further information on filing a program discrimination complaint?" (May 31, 2021).

<sup>718</sup> USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 31, 2021).

<sup>719</sup> USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 31, 2021).

<sup>720</sup> 7 C.F.R. § 15d.5(a) (2020); USDA, Filing a Discrimination Complaint (November 4, 2020); USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "How long do I have to file a USDA program discrimination complaint?" (May 31, 2021); USDA Complaint Form, AD-3027 (January 19, 2012); USDA, Nondiscrimination Regulation § 7(b)(1) (October 5, 2015).



agency; or (4) any other reason allowed by the Director of the Center for Civil Rights Enforcement.<sup>721</sup>

## VII. 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>722</sup> It is possible USDA will ask the farmer for more information.<sup>723</sup> If so, the farmer has thirty days to respond, although the farmer may ask for more time.<sup>724</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>725</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>726</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>727</sup>

USDA will then analyze the complaint and the report to reach a final decision on the complaint.<sup>728</sup> The decision should include an analysis of the claims and whether discrimination was found. USDA may conclude that the local USDA agency has adequately corrected the discrimination.<sup>729</sup>

If discrimination was found, USDA may try to settle the complaint and may take other corrective action.<sup>730</sup> If not, discrimination is found the case is closed. The final decision will be mailed to the farmer.

## VIII. Mediation

Along the way, USDA may offer mediation to the farmer.<sup>731</sup>

<sup>721</sup> See USDA OASCR, How to File a Program Discrimination Complaint (May 31, 2021); USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, “How do I request a waiver of the 180-day filing deadline?” (May 31, 2021); USDA, Nondiscrimination Regulation § 7(b)(2) (October 5, 2015). To request a waiver, contact USDA at (202) 260-1026 (local) or (866) 632-9992 (toll free), or email [CR-INFO@usda.gov](mailto:CR-INFO@usda.gov).

<sup>722</sup> USDA, How to File a Discrimination Complaint (May 31, 2021); USDA, Nondiscrimination Regulation § 7(c)(1)-(2) (October 5, 2015).

<sup>723</sup> USDA, Nondiscrimination Regulation § 7(c)(2) (October 5, 2015).

<sup>724</sup> USDA, Nondiscrimination Regulation § 7(c)(4) (October 5, 2015).

<sup>725</sup> USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 31, 2021); 7 C.F.R. 15d.5(b) (2020); USDA, Nondiscrimination Regulation § 7(c)(6) (October 5, 2015).

<sup>726</sup> The Report of Investigation will be available to the farmer through the Freedom of Information Act.

<sup>727</sup> USDA, Nondiscrimination Regulation § 5(g), “Complaint Investigation” (October 5, 2015).

<sup>728</sup> USDA, Nondiscrimination Regulation §§ 5(k), “Final Agency Decision,” 7(f) (October 5, 2015).

<sup>729</sup> USDA, Nondiscrimination Regulation § 7(f) (October 5, 2015).

<sup>730</sup> USDA, Nondiscrimination Regulation §§ 5(l), “Settlement Agreement,” 7(f) (October 5, 2015).

<sup>731</sup> USDA, Nondiscrimination Regulation § 7(d) (October 5, 2015).



## **IX. Disability Claims Somewhat Different**

Claims of discrimination based on disability operate under somewhat different rules.<sup>732</sup>

## **X. Checking the Status of a Complaint**

Farmers may check the status of a complaint by either calling or emailing USDA.<sup>733</sup>

Calls should be made to the Information Research Service of OASCR at either (202) 260-1026 (local), or (866) 632-9992 (toll free).<sup>734</sup> Individuals who are deaf, hard of hearing, or have speech disabilities, may contact OASCR using the Federal Relay Service, at (800) 877-8339 or (800) 845-6136 (Spanish).

Emails should be sent to the Information Research Service of OASCR, at [CR-INFO@usda.gov](mailto:CR-INFO@usda.gov).<sup>735</sup>

## **XI. Reprisals**

USDA is not allowed to subject a person to reprisal for filing a complaint or opposing a discriminatory practice.<sup>736</sup> That means USDA may not intimidate, threaten, harass, coerce, discriminate against, or otherwise retaliate against that person.<sup>737</sup>

## **XII. USDA Reporting on Discrimination Complaints**

The 2008 Farm Bill required USDA to report on civil rights matters.<sup>738</sup> USDA rules give responsibility for those reporting requirements to OASCR.<sup>739</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>740</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.

The last report was for the fiscal year 2019 and was completed in September 2020.<sup>741</sup>

<sup>732</sup> USDA, Nondiscrimination Regulation, § 7(f), (i) (October 5, 2015).

<sup>733</sup> USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, “How do I check the status of my program discrimination complaint?” (May 31, 2021).

<sup>734</sup> USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, “How do I check the status of my program discrimination complaint?” (May 31, 2021).

<sup>735</sup> USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, “How do I check the status of my program discrimination complaint?” (May 31, 2021).

<sup>736</sup> 7 C.F.R. § 15d(3)(b) (2020).

<sup>737</sup> USDA Complaint Form, AD-3027 (January 19, 2012).

<sup>738</sup> Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, section 14007 (codified at 7 U.S.C. § 2279-2).

<sup>739</sup> 7 C.F.R. §§ 2.25(a)(22), 15d.4(c) (2020).

<sup>740</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.

<sup>741</sup> USDA, Report of Civil Rights Complaints, Resolutions, and Actions for Fiscal Year 2019 (2020), at: <https://www.usda.gov/sites/default/files/documents/fy2019-civil-rights-complaints-report.pdf>.

According to the September 2020 report, in fiscal year 2019, 260 program discrimination complaints were filed against USDA.<sup>742</sup> In fiscal year 2018, 277 program discrimination complaints were filed against USDA.

At the end of fiscal year 2019, there were 392 outstanding program discrimination complaints at USDA agencies.<sup>743</sup> At the end of fiscal year 2018, there were 425 outstanding program discrimination complaints at USDA. These include complaints of discrimination based on race as well as other bases, such as age and disability.

The average processing time for a program complaint at USDA in fiscal year 2019 was 989 days.<sup>744</sup> For the Farm Service Agency (FSA), the agency that implements CFAP 2, the average processing time for a discrimination complaint in 2019 was 2,293 days. For fiscal year 2018, the average processing time for a USDA program discrimination complaint was 1,030 days. For FSA, the average processing time for a discrimination complaint in fiscal year 2018 was 1,915 days.

In fiscal year 2019, USDA found discrimination in four cases.<sup>745</sup> In fiscal year 2019, thirty-eight program complaints were resolved with a settlement agreement. In fiscal year 2018, USDA found discrimination in a total of two cases. In fiscal year 2018, thirty-three program complaints were resolved with a settlement agreement.

### **XIII. Proposed Realignment at USDA in 2018**

In 2018, USDA announced in the Federal Register that it was proposing a “realignment” of the Office of the Assistant Secretary for Civil Rights (OASCR).<sup>746</sup> In this document, USDA announced its intention to strengthen civil rights at USDA. Included in the intended proposals was the implementation of a timely, fair, transparent, and consistent approach to addressing discrimination complaints filed by farmers.<sup>747</sup> At about the same time, USDA issued a Memorandum from the Secretary of Agriculture that described USDA’s intention to strengthen civil rights management functions at USDA.<sup>748</sup> The Memorandum describes some aspects of a bureaucratic realignment of USDA civil rights programs. It also says that OASCR plans to implement a timely, fair, transparent, and consistent approach to farmer discrimination complaints.<sup>749</sup>

There does not appear to be any public discussion from USDA of a follow-up to the Federal Register announcement or the Secretary’s Memorandum.

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<sup>742</sup> USDA, Report of Civil Rights Complaints, at 4 (2020).

<sup>743</sup> USDA, Report of Civil Rights Complaints, at 4 (2020).

<sup>744</sup> USDA, Report of Civil Rights Complaints, at 10 (2020).

<sup>745</sup> USDA, Report of Civil Rights Complaints, at 12-13 (2020).

<sup>746</sup> USDA, Strengthening Civil Rights Management, 85 Fed. Reg. 10,825 (March 13, 2018), at: <https://www.federalregister.gov/documents/2018/03/13/2018-05051/strengthening-civil-rights-management>.

<sup>747</sup> Strengthening Civil Rights Management, 85 Fed. Reg. 10,825, 10,826 (March 13, 2018).

<sup>748</sup> USDA, Secretary’s Memorandum 1076-023, Strengthening Civil Rights Management Functions (March 9, 2018), at [https://www.ocio.usda.gov/sites/default/files/docs/2012/SM1076-023\\_Strengthening\\_Civil\\_Rights.pdf](https://www.ocio.usda.gov/sites/default/files/docs/2012/SM1076-023_Strengthening_Civil_Rights.pdf).

<sup>749</sup> USDA, Secretary’s Memorandum 1076-023, Strengthening Civil Rights Management Functions, para. 3 (March 9, 2018).

#### **XIV. A Realistic View of the USDA Discrimination Complaint Process**

On paper, and in theory, USDA has a discrimination complaint process that can work. OASCAR investigates discrimination complaints filed by farmers and decides if discrimination has taken place.

In the past USDA has had a great deal of difficulty conducting timely and effective civil rights investigations.<sup>750</sup> As the September 2020 report shows, USDA tends to have a hard time keeping up with discrimination complaints and is not often finding discrimination when they are completed. There are a number of settlements of complaints, but it is difficult to know the extent to which they provide relief for farmers. Long delays and gaps in USDA reporting on discrimination complaints is also not encouraging.

#### **XV. Lawsuit Also Possible: Beware of Statute of Limitations**

Filing a federal lawsuit is also possible.<sup>751</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>752</sup>

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<sup>750</sup> See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

<sup>751</sup> USDA, Nondiscrimination Regulation § 7(a)(4), "Complaint Investigation" (October 5, 2015).

<sup>752</sup> USDA, Nondiscrimination Regulation § 7(a)(4), "Complaint Investigation" (October 5, 2015).