

# Rules and Regulations

Federal Register

Vol. 73, No. 249

Monday, December 29, 2008

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## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

#### 7 CFR 1400

RIN 0560-AH85

#### Farm Program Payment Limitation and Payment Eligibility for 2009 and Subsequent Crop, Program, or Fiscal Years

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Interim rule.

**SUMMARY:** The Commodity Credit Corporation (CCC) is revising regulations as required by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) to make changes in payment eligibility, payment attribution, maximum income limits, and maximum dollar benefit amounts for participants in CCC-funded programs. This interim rule amends the regulations to ensure that program payments and benefits are issued only to those persons and entities that meet all eligibility requirements, that a program participant does not receive any program payment above the maximum allowable benefit amount, and that applicable payments are not made to anyone whose average adjusted gross income exceeds the maximum dollar amounts established by the 2008 Farm Bill. This interim rule will apply to 2009 and subsequent crop, program, or fiscal year benefits for programs subject to the provisions in our regulations.

**DATES:** *Effective Date:* This rule is effective December 23, 2008.

*Comment Date:* We will consider comments that we receive by January 28, 2009.

**ADDRESSES:** We invite you to submit comments on this interim rule. In your comment, include the volume, date, and

page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *E-Mail:*

*Salomon.Ramirez@wdc.usda.gov.*

- *Fax:* (202) 690-2130.

- *Mail:* Salomon Ramirez, Director, Production, Emergencies and Compliance Division, FSA, U.S. Department of Agriculture (USDA), Stop 0517, Room 4752, 1400 Independence Ave., SW., Washington, DC 20250-0517.

- *Hand Delivery or Courier:* Deliver comments to the above address.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Comments may be inspected at the mail address listed above between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. A copy of this interim rule is available through the Farm Service Agency (FSA) home page at <http://www.fsa.usda.gov/>.

**FOR FURTHER INFORMATION CONTACT:**

Salomon Ramirez, Director, Production, Emergencies and Compliance Division, FSA, USDA, Stop 0517, 1400 Independence Ave., SW., Washington, DC 20250-0517. Telephone: (202) 720-7641. Electronic mail:

*Salomon.Ramirez@wdc.usda.gov.*

Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:**

#### Background

This rule implements provisions in sections 1603 and 1604 of the 2008 Farm Bill (Pub. L. 110-246) concerning payment eligibility and payment limits for participants in CCC-funded programs. The 2008 Farm Bill provides new eligibility requirements based on annual income, sources of income, and type of entity. This rule amends 7 CFR part 1400 to implement these changes.

#### Applicability of Part 1400

The applicability of part 1400 is amended as required by the 2008 Farm Bill to include new programs authorized by the 2008 Farm Bill. These changes are specified in § 1400.1, "Applicability." All of the amendments made by this rule apply to the 2009 and subsequent crop, program, or fiscal years.

#### Payment Eligibility—Annual Income and Sources of Income

The 2008 Farm Bill provides that, notwithstanding any other provision of law, a person or legal entity is not eligible to receive commodity program benefits such as direct payments and counter-cyclical payments or Average Crop Revenue Election (ACRE) program payments if the average adjusted gross income (AGI) of the person or legal entity from nonfarm sources exceeds \$500,000. Similarly, a person or legal entity is not eligible for direct payments if the average adjusted gross income from farming, ranching, and forestry operations of the person or legal entity exceeds \$750,000. A person or legal entity is ineligible for conservation program benefits or payments if the average adjusted gross nonfarm income of the person or legal entity exceeds \$1,000,000, unless not less than 66.66 percent of the adjusted gross income of the person or legal entity is derived from farming, ranching, and forestry operations, as determined by the Secretary. As required by the 2008 Farm Bill, this rule provides that with respect to programs administered by FSA the Administrator of FSA may waive the AGI limit for conservation and related program benefits on a case-by-case basis for the protection of environmentally sensitive land or other land of special significance. Similarly, with respect to programs administered by the Natural Resources Conservation Service (NRCS), this rule provides that the Chief of NRCS may issue such a waiver. Specific criteria that must be met for the consideration of the waiver are outlined in this rule.

The AGI limits implemented by this rule replace the prior limit of \$2.5 million and the previous exception for those earning 75 percent of their income from farming.

This rule amends § 1400.3, "Definitions," to add definitions for "Average Adjusted Gross Income," "Average Adjusted Gross Farm Income," and "Average Adjusted Gross Nonfarm Income." It also amends subpart F (prior to this rule, subpart G), "Average Adjusted Gross Income Limitation," to implement these AGI limits that are required by the 2008 Farm Bill.

The 2008 Farm Bill AGI requirements for payment eligibility apply to payments from commodity programs

and from all conservation programs that are specified by Title II of the 2008 Farm Bill and Title XII of the Food Security Act of 1985 (Pub. L. 99-198, commonly known as the 1985 Farm Bill). AGI will be calculated based on the average income for the 3 taxable years preceding the most immediately preceding complete taxable year for which benefits are requested. The 3 year average method of determining AGI is unchanged, except that the relevant 3 year period is now the 3 taxable years preceding the most immediately preceding complete taxable year for which benefits are requested, while previously the method used the 3 years prior to the year for which program benefits are requested. The definition of AGI will be based on the Internal Revenue Service definition, which is unchanged.

The definition of income derived from farming, ranching, and forestry operations in § 1400.501, "Determination of Average Adjusted Gross Income," is expanded by this rule to include income from the processing, storing, and transporting of farm, ranch, and forestry commodities; production of farm-based renewable energy; and, in some instances, the provision of production inputs and services to farmers, ranchers, and foresters. These activities were included in the provisions for determining farm income in section 1604 of the 2008 Farm Bill.

#### **Payment Limits for Specific Programs**

Subpart A, "General Provisions," § 1400.1, "Applicability," sets payment limits for specific programs. The 2008 Farm Bill provides that the payment limit is \$40,000 for the Direct and Counter-cyclical Program (DCP) direct payments and \$65,000 for DCP counter-cyclical payments. That is unchanged from the previous limit. The limit of \$50,000 for CRP payments is unchanged. The limit of \$100,000 for Noninsured Crop Disaster Assistance Program (NAP) payments is unchanged. The limit on Environmental Quality Incentives Program (EQIP) payments is reduced from \$450,000 to \$300,000 for the term of the program.

This rule adds a limit of \$100,000 for Supplemental Revenue Assistance Program (SURE) payments and for Tree Assistance Program (TAP) payments. Total payments from SURE, the Livestock Indemnity Program (LIP), the Livestock Forage Disaster Program (LFP), and the Emergency Assistance Program for Livestock, Honey Bees, and Farm-raised Fish (ELAP) may not exceed \$100,000.

This rule removes the limit of \$75,000 specifically for the Marketing Assistance

Loans (MAL) program gains and Loan Deficiency Payments (LDP) program; there are no longer any limits on payments for MAL and LDP.

As specified in the 2008 Farm Bill, if a person or legal entity is participating in ACRE, the direct payments will be reduced by 20 percent on each farm participating in ACRE. The total limit for counter-cyclical payments and ACRE payments as specified in this rule is \$65,000 plus the amount the direct payments were reduced. The 2008 Farm Bill specifies the same limits for peanuts. All the program-specific payment limits are specified in § 1400.1, "Applicability."

#### **Payment Limitation—Eligible Persons and Entities**

The regulations governing persons and legal entities eligible for payments are in part 1400, subpart B. This rule changes the title of subpart B, "Person Determinations," to "Payment Limitation" and makes other changes to the subpart required by the 2008 Farm Bill.

This rule amends the definition of "person" and adds a definition of "legal entity" in § 1400.3, "Definitions." The 2008 Farm Bill defines "person" as a natural person. The definition of person in this rule no longer includes a legal entity or government agency.

This rule removes the sections in subpart B describing various kinds of legal entities that are no longer relevant for the purpose of determining payment limits.

This rule changes the provisions for spouses in regard to separate or combined status for payment limitation purposes. Spouses may still each qualify for a separate payment limitation, but the provisions where husband and wife are considered combined for the purposes of this part are removed. While each spouse may now have their own respective limitation, each must also meet applicable program and payment eligibility requirements to receive program benefits. The rule includes a new provision by which if one spouse is determined to be actively engaged in farming, the other spouse is credited for the purposes of payment eligibility with making significant contributions of active personal labor or active personal management to the farming operation. This is not to be construed as meaning if one spouse qualifies for payment, the other automatically qualifies as well. As previously mentioned, both spouses must make significant and requisite contributions to the farming operation that are commensurate with their claimed shares to be considered actively

engaged in farming and eligible for program benefits.

This rule removes both the 3-entity rule for payment limitation purposes and the definition of substantial beneficial interest. A person may now receive program benefits through an unlimited number of entities. The process of determining payment limits for entities no longer requires a designation of substantial beneficial interest. Since substantial beneficial interest only applied to the designation of entities for payment under the 3-entity rule, that term is not necessary and has been removed.

Payment limitation will be determined by direct attribution, taking into account the direct and indirect ownership interests of a person or legal entity that is eligible to receive such payment. The new attribution of payments provisions are in a new § 1400.105, "Attribution of Payments," and a new definition of attribution is added to § 1400.3, "Definitions." Attribution will be tracked through four levels of ownership in legal entities. For the purposes of determining whether a person or legal entity has met the new payment limits, every payment made directly to a person or legal entity will be combined with their pro rata interest in payments received by a legal entity in which the person or legal entity has a direct or indirect ownership interest. Payments made to a legal entity will be attributed directly to persons and limited to the amounts specified in subpart A.

This rule adds a new § 1400.107, "Notification of Interests," which requires each person or legal entity receiving payments to provide the name and taxpayer ID number of each legal entity in which the person or legal entity holds an ownership interest. While this is designated as a new section, this requirement was in effect previous to the 2008 Farm Bill, as part of the eligibility requirements for the now-obsolete 3-entity rule.

Payments made to a joint venture or general partnership will not exceed the payment limit multiplied by the number of persons or legal entities (other than joint ventures and general partnerships) that comprise the direct ownership of the joint venture or general partnership.

Payments issued to a minor child will be attributed to the child's parent who receives the larger amount in program payments compared to the other parent, both directly and indirectly, unless certain conditions are otherwise met.

For the purposes of attribution in § 1400.105, "Attribution of Payments," the payment limitations specified will not apply to marketing cooperatives but

will now apply to the producers or members of those cooperatives as persons.

The 2008 Farm Bill provides that Federal agencies are not eligible for program benefits. Similarly, State and local governments and political subdivisions, and agencies thereof, will no longer be eligible, with an exception for payments earned on State-owned land that is used for the support of public schools. Payments received under this public school support exception are limited to \$500,000 annually, unless the State has a population of less than 1.5 million.

This rule amends § 1400.3 by removing the definition of "Tribal venture." This rule also amends § 1400.4 by removing all references to Indian tribal ventures, including the restrictions on payments to such ventures. In this rule, § 1400.4 exempts Indian tribes, as defined in 1400.3, from all requirements of this part. Provisions of this part apply to persons or legal entities. Indian tribes are not included under the definition of person or legal entity as provided by the 2008 Farm Bill for the application of the payment eligibility and payment limitation provisions. The 2008 Farm Bill does not impose any limitations or restrictions on program payments and benefits to Federally recognized Indian tribes. This exemption to the provisions of this part only applies to Indian tribes. The payment eligibility and payment limitation requirements remain applicable to individual American Indians or Alaska Natives receiving program payment and benefits as individuals, or through a group in which all members of the group are American Indians or Alaska Natives.

This rule provides more restrictive payment eligibility requirements than the prior requirements for new persons and legal entities that are added to an existing farming operation. These requirements, referred to as the "substantive change" rule, are found in § 1400.104 (previously § 1400.109), "Changes in Farming Operations." These discretionary changes require that any transfer of land or equipment by sale or gifting between existing members and new members must be based on fair market value of the land or equipment, the sale cannot be owner financed, and the former owner of the land or equipment cannot retain any residual control or preferential buyback rights to the land or equipment. This is to ensure that this change or transfer actually occurs other than just on paper. Otherwise, the person or legal entity being added to the farming operation could be obtaining program payments in

the absence of making the requisite and significant contributions to the farming operation for eligibility. Furthermore, the farming operation would be gaining another limitation even though no real, meaningful change occurred in the farming operation to justify the additional limitation.

Requirements in the substantive change rule for an addition of persons or legal entities to an existing farming operation can also be met through an addition of land to the existing farming operation. Previously, an increase of cropland operated by the farming operation of at least 20 percent and with a planting history comparable to the area was required. Now the requirement is the addition of base acres in an amount that represents at least a 20 percent increase from the previous year. This 20 percent increase in base acres will now qualify one additional person or legal entity for payment limitation purposes, rather than an unlimited number of additional persons or legal entities. However, additional persons or legal entities beyond one for payment limitation purposes may be recognized if an FSA State Office specialist determines that the increase in base acres was of a magnitude that would support further additions to the farming operation of persons or legal entities for payment limitation purposes.

These revisions to the substantive change rule are being announced prior to the beginning of a crop or program year to afford adequate time for any existing farming operation and its members that are contemplating such operational changes for the coming year to be fully informed of these revisions.

An example of whether a change in farming operations will be considered a "substantive change" by this rule would be that Father A has previously conducted an individual farming operation consisting of all owned land. In 2009, Father A expands the operation by forming a three-member general partnership with his now adult children B and C, and with each member having equal shares. No additional acreage is farmed, but Father A has gifted to each child one-third of the owned land. The gifted land is commensurate with individuals' share of the farming operation. Previously, this would be considered a bona fide and substantive change in the farming operation. Through the landowner provision, each person would be considered actively engaged in farming and each would have their own respective payment limitation.

With this interim rule, this would still be considered a substantive change in the farming operation, but proof of the

gifting of this land to the children must be provided. The land transfers would most likely be recorded at the Register of Deeds, new deeds would be issued to reflect the current owners of the land, and all parties would have been expected to report the gifts to the Internal Revenue Service (IRS) for tax purposes. Documentation as described would lend support that the substantive change requirements were met.

Another example would be an existing three-member general partnership comprised of a Father B and children D and E. The decision was made to expand the farming operation for 2009 for the inclusion of two newly formed limited liability companies, F and G, each of which are comprised of the individuals, B, D and E. The decision to expand the operation was based on the rental of the neighbor's farm. The increase in base acres held by the general partnership in 2008 and the amount that would be controlled in 2009 was over 50 percent.

Previously, this would be considered a bona fide and substantive change in the farming operation as the addition was of cropland of at least 20 percent. Both of the legal entities would have been recognized in the farming operation for payment limitation purposes. Under the revised regulation, a substantive change will be considered to have occurred in the farming operation with the increase in base acres of at least 20 percent. Under the revised regulation, the bona fide and substantive change which occurred in the farming operation with the increase in base acres of more than 20 percent would initially qualify only one of the legal entities for payment limitation purposes. However, in this example, the increase in base acres was twice the minimum amount required. The partnership would therefore be afforded the opportunity to submit a written request for the increase in one additional person or legal entity to the farming operation. The request would be forwarded to the reviewing authority in the State FSA office designated to consider such cases. Upon review of the supporting documentation provided with the request, a determination would be made and issued accordingly.

The entire subpart D that provided the specifics of the 3-entity rule is removed, and subsequent subparts redesignated. The 2008 Farm Bill eliminated the 3-entity rule. The removal of this subpart means that persons can receive payments based on ownership in an unlimited number of entities, until the payment limits in subpart A are reached. All payments will be traced

through four levels of ownership for direct attribution to persons.

#### **Clarifications Made To Provide Clarity and Enforceability**

This interim rule also implements revisions to the existing requirements for payment eligibility and payment limitation. These changes are made to strengthen or clarify existing regulatory provisions while remaining consistent with statutory provisions, to provide consistency in determinations, and to simplify the administration of the payment eligibility and payment limitation provisions.

This rule amends § 1400.2, “Administration,” to clarify that eligibility determinations will be made within 60 days after the supporting documentation is received in the county office.

This rule amends § 1400.502 (redesignated, previously § 1400.602), “Compliance and Enforcement,” to require that persons and legal entities provide detailed supporting documentation on AGI each year to CCC. Previously, the regulation required this compliance information only when specifically required by CCC. Similarly, this rule amends that same section to specify that audits will be conducted to determine compliance, while previously the regulation specified only that audits may be conducted.

This rule amends § 1400.6, “Joint and Several Liability” (redesignated, previously § 1400.7), to clarify possible conditions for release from liability. The provisions of the 2008 Farm Bill now extend the reach of liability for the recovery of payments to any party determined to have participated in a scheme or device or other equally serious actions for the purpose of evading the provisions of this part. In the event a person cooperates with the enforcement of these provisions, the Executive Vice President of CCC has the authority to partially or fully release that person from liability.

#### **Payment Eligibility—Actively Engaged in Farming**

This rule changes the title of subpart C from “Actively Engaged in Farming Determinations” to “Payment Eligibility.” The general structure and content of this subpart remain unchanged. The 2008 Farm Bill requires that, in order to be eligible for payment, a person or legal entity be actively engaged in farming, and further defines “actively engaged” as consisting of a substantial contribution of capital, equipment, or land and personal labor or active personal management. This interim rule clarifies the “actively

engaged” eligibility requirements to be consistent with the 2008 Farm Bill, including making discretionary changes as to what constitutes a substantial contribution and who must make such a contribution. This rule provides that a contribution of active personal labor, active personal management, or a combination thereof, must be provided by each member or shareholder that has an ownership interest in an entity that requests program benefits and collectively, such contributions must be significant and commensurate. Furthermore, the contribution of active personal labor or active personal management of each member of shareholder must be made to the farming operation on a regular basis and must be identifiable and documentable as a separate and distinct contribution from that of any other member or shareholder in the farming operation. The 2008 Farm Bill requires a significant contribution of active personal labor or active personal management to a farming operation to qualify a person or legal entity for payment. Previously, significant contributions could be made by members or stockholders that comprised only 50 percent ownership interest in the entity being qualified in order to qualify all the members or stockholders. Previously, the active personal labor or management contribution for the legal entity could be made by some of the stockholders or members, while the remaining stockholders and members could make no requisite and at-risk contributions to the farming operation and still realize benefits indirectly through the legal entity.

An example to illustrate the changes in this interim rule concerning what constitutes actively engaged in farming is provided below:

Corporation A is held equally by stockholders B, C, D and E. Corporation A provides all of the capital, leases all of the equipment, cash rents all of the land, and hires all of the labor necessary to farm this land. The stockholders represent that they equally provide all of the active personal management necessary to successfully conduct this farming operation. Regular management meetings are held, either in person or by conference call, in which the stockholders jointly make all decisions concerning all financing, purchasing, planting, harvesting, marketing and the supervision of all hired labor in the farming operation.

Previously, the corporation just described would be considered actively engaged in farming by the entity’s contributions of capital, land and equipment, and the collective

contribution of active personal management of all stockholders. The stockholders that made contributions to qualify the entity held more than 50 percent ownership interest in the entity that requested program benefits.

With this rule, each of the stockholders in this example would be required to establish that their respective contribution of active personal management was made on a regular basis, and was identifiable and documentable as separate and distinct from the other stockholders of the entity. For example, stockholder B could represent through copies of signed purchase orders that stockholder B was individually responsible for obtaining and purchasing all inputs for the farming operation on behalf of the Corporation. Stockholder C could represent through signed contracts and delivery agreements with grain elevators and a cotton gin that stockholder C was individually responsible for the marketing of all commodities produced by the Corporation’s farming operation. Stockholder D could represent through copies of payroll records that stockholder D was individually responsible for the supervision of all hired labor utilized by the Corporation’s farming operation. However, if Stockholder E made no claim of management that is separate and distinct from the other stockholders, then as the result of Stockholder E’s failure to meet the requirements of this interim rule, the payments issued to the payment entity, that being Corporation A, would be reduced by the interest held by Stockholder E.

#### **Reduction or Denial of Program Payments and Benefits**

The provisions for the denial of program payments and benefits are expanded under the 2008 Farm Bill. Payments and benefits will be denied for at least two years if a person or legal entity is determined to have adopted a scheme or device to circumvent the payment eligibility and payment limitation requirements. This interim rule now provides additional guidance in § 1400.5, “Denial of Program Benefits” (renamed, previously titled “Scheme or Device”), on what actions are considered to be a scheme or device and what the indicators may be that a scheme is being perpetrated. Under the 2008 Farm Bill, if fraud or other equally serious actions are determined to exist, all parties involved may be ineligible for all payments and benefits under the programs subject to the provisions of this part for up to 5 years.

The application of the AGI limitation requires a reduction in any payments or

benefits issued to a joint venture, general partnership or legal entity in an amount commensurate with the direct and indirect ownership interest of any person or legal entity that fails to comply with the respective adjusted gross income limitation eligibility standard for the direct receipt of such payments or benefits. Previously, ownership interest was tracked and reviewed to the sixth level to determine whether a commensurate reduction was applicable and the extent of such reduction. Now with the implementation of direct attribution for payment limitation in which ownership in legal entities is tracked through four levels, the ownership interest in legal entities for the application of the AGI limitations will also be tracked through the same number of levels.

#### Miscellaneous Minor Changes and Housekeeping

Subparts D, “Cash Rent Tenants,” and E, “Foreign Persons” (redesignated, previously subparts E and F), are largely unchanged, except for the references to natural persons and legal entities discussed above and that were made throughout the part. This rule makes minor amendments to subpart D, “Cash Rent Tenants,” to clarify that if a cash rent tenant is a joint operation, each member must make a significant contribution of active personal labor or management to be eligible for payments. This amendment is needed to be consistent with other changes in this part regarding payment eligibility and with the 2008 Farm Bill.

This rule reorganizes part 1400, including changing the order of some

sections, renumbering sections, and renaming some sections and subparts. These housekeeping changes are intended to improve readability and do not make substantive changes to the regulations. Subpart B, “Person Determinations,” is renamed “Payment Limitation.” Subpart C, “Actively Engaged in Farming Determinations,” is renamed “Payment Eligibility.” Subpart D, “Permitted Entities,” is removed; subsequent subparts are renumbered. Throughout the part, references to “individual(s) and entities” are changed to “person(s) and legal entities,” consistent with the 2008 Farm Bill requirement to attribute payments to natural persons. Similarly, references to 2003 through 2007 crop years are changed to refer to the 2009 through 2012 crop years.

#### SUMMARY OF AMENDMENTS TO 7 CFR PART 1400 MADE BY THIS RULE

Previous regulation	Revised regulation
Title of part 1400. Payment Limitation and Payment Eligibility.	Title amended to specify “for 2009 and Subsequent Crop, Program or Fiscal years.”
Subpart A—General provisions .....	Revised references to the programs for which this regulation now applies including ACRE, NAP, ELAP, LFP, LIP, TAP, and applicable NRCS conservation programs, and added the respective payment limitations. Applicable NRCS conservation programs include:
§ 1400.1 Applicability	<ul style="list-style-type: none"> <li>• Agricultural Management Assistance (AMA),</li> <li>• Agricultural Water Enhancement Program (AWEP),</li> <li>• Chesapeake Bay Watershed Program (CBWP),</li> <li>• Conservation Stewardship Program (CSTP),</li> <li>• Cooperative Conservation Partnership Initiative (CCPI),</li> <li>• Environmental Quality Incentives Program (EQIP),</li> <li>• Farm and Ranchland Protection Program (FRPP),</li> <li>• Grasslands Reserve Program (GRP),</li> <li>• Wetlands Reserve Program (WRP), and</li> <li>• Wildlife Habitat Incentive Program (WHIP).</li> </ul>
§ 1400.2 Administration .....	Removed the programs for which this regulation no longer applies.
	Provided a reference point for the start of the 60-day period for CCC to make determinations.
	Clarified that the 60-day time period specified does not apply to the completion of end of year reviews for compliance.
§ 1400.3 Definitions .....	New definitions for attribution, average adjusted gross income, average adjusted gross farm income, average adjusted gross nonfarm income, contribution, and legal entity.
	Revised definitions for person, joint operation, active personal labor, and active personal management.
	Removed definitions of entity, Indian tribal ventures, permitted entity, and substantial beneficial interest.
§ 1400.4 Indian Tribal Ventures .....	Title changed to Indian Tribes.
	Added that Indian tribes, as defined, are exempt from all provisions of this part.
§ 1400.5 Scheme or Device .....	Title changed to Denial of program benefits:
	Added (1) Indicators of actions that may be considered a scheme or device;
	(2) The period of ineligibility if fraud is determined;
	(3) Producer ineligibility extends to cash rent tenants; and
	(4) Denial of benefits to all parties on a pro rata basis according to ownership interest.
§ 1400.6 Joint and Several Liability .....	Added (1) The basis and extent of ineligibility and payment recovery and
	(2) Possible conditions for partial or full release from liability.
	Removed reference to individuals and entities considered one “person.”
§ 1400.7 Commensurate Contributions .....	Title changed to Commensurate Contributions and Risk.
	Revised reference from individuals and entities to persons and legal entities.
	Added that risk must be commensurate with the claimed share of the farming operation.
§ 1400.9 Appeals .....	Revised reference from individuals and entities to persons and legal entities.
1400 Subpart B Person Determinations .....	Renamed to Payment Limitation.
§ 1400.100 through 1400.107	Removed all references to “person” determinations and the timing of making such “person” determinations.
	Replaced with (1) Provisions for the control and limitation of payments to persons and legal entities by direct attribution;
	(2) Limitations and other restrictions for payments to States, political subdivisions and agencies thereof;
	(3) New provisions applicable only to spouses;

## SUMMARY OF AMENDMENTS TO 7 CFR PART 1400 MADE BY THIS RULE—Continued

Previous regulation	Revised regulation
1400 Subpart C Actively Engaged in Farming Determinations. § 1400.201 through 1400.213	(4) Additional requirements for the increase in persons to a farming operation that are eligible for payment; and (5) Required information from all persons and legal entities that request program payments. Removed sections 1400.108 and 109. Renamed to Payment Eligibility. Revised all references of individual and entity to person and legal entity.
1400 Subpart D Permitted Entities ..... § 1400.301	For uniformity, moved requirements of the definitions of “separate and distinct interest” and significant contribution from § 1400.3, “Definitions,” to the applicable sections of the subpart. Included additional requirements for the contributions of active personal labor or management by each of the stockholders or members of a legal entity in order for the legal entity to be considered actively engaged in farming. Renamed Subpart D Cash Rent Tenants. Removed all reference to permitted entities and the requirements of designation thereof for payment. Clarified the cash rent tenant requirements for joint operations and entities. Revised all references of individuals and entities to persons and legal entities. Redesignated from § 1400.401.
1400 Subpart E Cash Rent Tenants ..... § 1400.401	Redesignated Subpart E to Subpart D. Redesignated § 1400.401 to 1400.301.
1400 Subpart F Foreign Persons ..... §§ 1400.501 through 1400.502	Redesignated Subpart F to Subpart E. Redesignated §§ 1400.501 through 1400.502 to §§ 1400.401 through 1400.402. Revised all references of individuals and entities to persons and legal entities; included revised standards for active personal labor in the definition of substantial contribution of active personal labor.
1400 Subpart G Average Adjusted Gross Income. § 1400.600 through 1400.603	Redesignated Subpart G to Subpart F. Redesignated §§ 1400.600 through 1400.603 to §§ 1400.500 through 1400.503.  Revised (1) All references of individuals and entities to persons and legal entities; (2) All references of 2003 through 2007 years of applicability to 2009 through 2012; (3) All references of the \$2.5 million limitation to the three limitations—2 for commodity programs and one for conservation programs; and (4) The reference and application of the test for farm income from 75 percent to not less than 66.66 percent. Included the revisions (1) The definition and sources of income from farming, ranching, forestry and related activities and (2) Ownership interest in entities will be tracked through only four levels, rather than six, for consistency with the same number of levels as for direct attribution of payments.

**Notice and Comment**

Section 1601 of the 2008 Farm Bill requires that these amendments be issued through an interim rule for the 2009 and subsequent crop, fiscal, or program years. This rule is effective on publication, but subject to modification after the consideration of comments. CCC will consider comments received during the comment period for this interim rule, which ends January 28, 2009. After the comment period closes, CCC will publish another document in the **Federal Register**. The document will include a discussion of any comments received during the comment period and any amendments made to the rule as a result of the comments.

**Executive Order 12866**

The Office of Management and Budget (OMB) designated this interim rule as significant under Executive Order 12866. A cost-benefit assessment is summarized below and is available from the contact listed above.

**Summary of Economic Impacts**

The 2008 Farm Bill makes significant changes in how USDA will administer payment limits and determine who is eligible for payments. Those changes will be implemented beginning with the 2009 crop, fiscal, or program year, as applicable. The most fundamental change in how payment limits are to be administered is that each member or owner of farming entities will be assigned a limit. The payment limits that applied to the entities themselves under the 2002 Farm Bill are retained. The motivation for this change is twofold:

(1) Increase transparency by allocating payments made to farming entities to their members.

(2) Moderate payments by adding another layer of payment limits. For example, the 2008 Farm Bill maintains payment limits on the corporations themselves and adds additional limits on the owners of farming corporations.

USDA will be required to track payments made to entities, such as farming corporations, to the owners of

those entities. Such tracking is called direct attribution. Both entities and their owners will now have payment limits. Direct attribution will involve extensive USDA staff resources, and consequently cost, in the implementation phase and has the potential for some reduction in Government outlays. Reductions in outlays will diminish as farmers reorganize their operations in order to capture the highest possible payments. Due to uncertainty about the costs it is difficult to estimate annual impacts.

Other changes made in this interim rule are expected to result in little changes to Government outlays.

**Regulatory Flexibility Act**

This rule is not subject to the Regulatory Flexibility Act since CCC is not required to publish a notice of proposed rulemaking for this rule. CCC is authorized by section 1601 of the 2008 Farm Bill to issue an interim rule effective on publication with an opportunity for comment.

## Environmental Assessment

The environmental impacts of this final rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321–4347, the regulations of the Council on Environmental Quality (40 CFR Parts 1500–1508), and FSA's regulations for compliance with NEPA (7 CFR part 799). The changes to Payment Limitation and Payment Eligibility, required by the 2008 Farm Bill that are identified in this rule, are non-discretionary. Therefore, FSA has determined that NEPA does not apply to this rule and no environmental assessment or environmental impact statement will be prepared.

## Executive Order 12372

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published in the **Federal Register** on June 24, 1983 (48 FR 29115).

## Executive Order 12988

The interim rule has been reviewed in accordance with Executive Order 12988. This rule is not retroactive and does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be brought concerning the provisions of this rule the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

## Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

## Executive Order 13175

The policies contained in this rule do not impose substantial unreimbursed direct compliance costs on Indian tribal governments or have tribal implications that preempt tribal law.

## Unfunded Mandates

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) for State, local or tribal governments, or the private sector. In addition, CCC is

not required to publish a notice of proposed rulemaking for this rule. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

## Federal Assistance Programs

The title and number of the Federal assistance programs in the Catalog of Federal Domestic Assistance to which this interim rule applies are:

- 10.055—Direct and Counter-Cyclical Payments Program.
- 10.069—Conservation Reserve Program.
- 10.072—Wetlands Reserve Program.
- 10.082—Tree Assistance Program.
- 10.912—Environmental Quality Incentives Program.
- 10.914—Wildlife Habitat Incentive Program.
- 10.917—Agricultural Management Assistance.
- 10.918—Ground and Surface Water Conservation—Environmental Quality Incentives Program.
- 10.920—Grassland Reserve Program.

This interim rule also applies to the following Federal assistance programs that are not in the Catalog of Federal Domestic Assistance:

- ACRE,
- ELAP,
- LFP,
- LIP,
- SURE,
- AWEP,
- CBWP,
- CSTP,
- CCPI, and
- FRPP.

## Paperwork Reduction Act

The regulations in this rule are exempt from the requirements of the Paperwork Reduction Act (44 U.S.C. Chapter 35), as specified in section 1601(c)(2) of the 2008 Farm Bill, which provides that these regulations be promulgated and the programs administered without regard to the Paperwork Reduction Act.

## E-Government Act Compliance

CCC is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

## List of Subjects in CFR Part 1400

Agriculture, Loan programs—agriculture, Conservation, Price support programs.

■ For the reasons discussed above, this rule revises 7 CFR part 1400 to read as follows:

## PART 1400—PAYMENT LIMITATION AND PAYMENT ELIGIBILITY FOR 2009 AND SUBSEQUENT CROP, PROGRAM, OR FISCAL YEARS

### Subpart A—General Provisions

Sec.

- 1400.1 Applicability.
- 1400.2 Administration.
- 1400.3 Definitions.
- 1400.4 Indian Tribe.
- 1400.5 Denial of program benefits.
- 1400.6 Joint and several liability.
- 1400.7 Commensurate contributions and risk.
- 1400.8 Equitable treatment.
- 1400.9 Appeals.

### Subpart B—Payment Limitation

- 1400.100 Revocable trust.
- 1400.101 Minor children.
- 1400.102 States, political subdivisions, agencies thereof.
- 1400.103 Charitable organizations.
- 1400.104 Changes in farming operations.
- 1400.105 Attribution of payments.
- 1400.106 Payment limits.
- 1400.107 Notification of interests.

### Subpart C—Payment Eligibility

- 1400.201 General provisions for determining whether a person or legal entity is actively engaged in farming.
- 1400.202 Persons.
- 1400.203 Joint operations.
- 1400.204 Limited partnerships, limited liability partnerships, limited liability companies, corporations and other similar legal entities.
- 1400.205 Trusts.
- 1400.206 Estates.
- 1400.207 Landowners.
- 1400.208 Family members.
- 1400.209 Sharecroppers.
- 1400.210 Deceased and incapacitated persons.
- 1400.211 Persons and legal entities not considered to be actively engaged in farming.
- 1400.212 Growers of hybrid seed.
- 1400.213 Military personnel.

### Subpart D—Cash Rent Tenants

- 1400.301 Eligibility.

### Subpart E—Foreign Persons

- 1400.401 Eligibility.
- 1400.402 Notification.

### Subpart F—Average Adjusted Gross Income Limitation

- 1400.500 Applicability.
- 1400.501 Determination of average adjusted gross income.
- 1400.502 Compliance and enforcement.
- 1400.503 Commensurate reduction.

**Authority:** 7 U.S.C. 1308, 1308–1, 1308–2, 1308–3, 1308–3a, 1308–4, and 1308–5.

### Subpart A—General Provisions

#### § 1400.1 Applicability.

(a) This part, except as otherwise noted, is applicable to all of the following programs and any other

programs as provided in individual program regulations in this chapter (including, but not limited to, all price support programs in parts 1421 and 1434 of this chapter):

(1) The Direct and Counter-cyclical Program (DCP), including the Average Crop Revenue Election (ACRE), part 1412 of this chapter;

(2) The Conservation Reserve Program (CRP), part 1410 of this chapter;

(3) The Noninsured Crop Disaster Assistance Program (NAP), part 1437 of this chapter;

(4) The Supplemental Revenue Assistance Program (SURE), part 1480 of this chapter;

(5) The Livestock Forage Disaster Program (LFP), Livestock Indemnity Program (LIP), and the Emergency Assistance Program for Livestock, Honey Bees and Farm-raised Fish (ELAP), part 1439 of this chapter;

(6) The Tree Assistance Program (TAP), part 783 of this title; and

(7) The Natural Resource Conservation Service (NRCS) conservation programs of this title including Agricultural Management

Assistance (AMA), Agricultural Water Enhancement Program (AWEP), Chesapeake Bay Watershed Program (CBWP), Conservation Stewardship Program (CSTP), Cooperative Conservation Partnership Initiative (CCPI), Environmental Quality Incentives Program (EQIP), Farm and Ranchland Protection Program (FRPP), Grasslands Reserve Program (GRP), Wetlands Reserve Program (WRP), and Wildlife Habitat Incentive Program (WHIP).

(b) This part will apply to the programs specified in:

(1) Paragraphs (a)(1), (3), (4), and (6) of this section on a crop year basis;

(2) To the program in paragraph (a)(2) of this section on a fiscal year basis;

(3) To the programs in paragraph (a)(5) of this section on a calendar year basis; and

(4) To the programs in paragraph (a)(7) of this section based on available funding.

(c) This part will be used to determine the manner in which payments will be attributed to persons and legal entities for the payment limitations provided in

this section and to other programs as provided in individual program regulations in this chapter.

(d) Where more than one provision of this part may apply, the provision which is most restrictive on the program participant will be applied.

(e) The payment limitations of this part are not applicable to:

(1) Payments made under State conservation reserve enhancement program agreements approved by the Secretary and

(2) Payments made subject to this part if ownership interest in land or a commodity is transferred as the result of the death of a program participant and the new owner of the land or commodity has succeeded to the contract of the prior owner. If the successor is otherwise eligible, payments cannot exceed the amount the previous owner was entitled to receive at the time of death.

(f) The following amounts are the limitations on payments per person or legal entity for the applicable period for each payment or benefit.

Payment or benefit	Limitation per person or legal entity, per crop, program, or fiscal year
(1) Direct Payments for covered commodities <sup>1</sup>	\$40,000
(2) Direct Payments for peanuts <sup>1</sup>	40,000
(3) CRP annual rental payments <sup>2</sup>	50,000
(4) GRP	50,000
(5) WHIP	50,000
(6) WRP	50,000
(7) Counter-Cyclical Payments for covered commodities <sup>3</sup>	65,000
(8) Counter-Cyclical Payments for peanuts <sup>3</sup>	65,000
(9) NAP payments	100,000
(10) Supplemental Agricultural Disaster Assistance <sup>4</sup>	100,000
(11) TAP	100,000
(12) CSTP <sup>5</sup>	200,000
(13) EQIP	300,000

<sup>1</sup> If the person or legal entity has a direct or indirect interest in payments earned on a farm that is in ACRE, this limitation will reflect a 20 percent reduction in direct payments on each farm that is participating in ACRE.

<sup>2</sup> Limitation applicable only to CRP contracts approved prior to October 1, 2008.

<sup>3</sup> Under ACRE, this amount will be a combined limitation for counter-cyclical and ACRE payments. If a person or legal entity has a direct or indirect interest in payments earned on a farm that is participating in ACRE, this limitation will reflect an increase for the amount that the direct payments were reduced.

<sup>4</sup> Total payments received under Supplemental Agricultural Disaster Assistance through SURE, LIP, LFP, and ELAP may not exceed \$100,000.

<sup>5</sup> The \$200,000 limit is the total limit for 2009 through 2012. Note: AMA, AWEP, CBWP, CCPI, and FRPP are all limited by available funding rather than an amount by participant.

(g) With respect to contracts for conservation programs approved prior to October 1, 2008, the payment limitation rules in 7 CFR part 1400 in effect on September 30, 2008 will be applicable (see 7 CFR part 1400, revised as of January 1, 2008).

#### § 1400.2 Administration.

(a) The regulations in this part will be administered under the general supervision and direction of the Executive Vice President, Commodity

Credit Corporation (CCC), and the Administrator, Farm Service Agency (FSA). In the field, the regulations in this part will be administered by the FSA State and county committees (referred to as "State committee" and "county committee," respectively).

(b) State executive directors, county executive directors, and State and county committees do not have authority to modify or waive any of the provisions of this part.

(c) The State committee may take any action authorized or required by this part to be taken by the county committee that has not been taken by such committee. The State committee may also:

(1) Correct or require a county committee to correct any action taken by such county committee that is not in accordance with this part or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.



(d) No delegation in this part to a State or county committee precludes the Executive Vice President, CCC, and the Administrator, FSA, or a designee, from determining any question arising under this part or from reversing or modifying any determination made by a State or county committee.

(e) Benefits from programs subject to this part may not be issued until all required forms and necessary payment eligibility and payment limitation determinations are made.

(f) The initial payment eligibility determinations will be made within 60 days after the required forms and any other supporting documentation needed in making such determinations are received in the county FSA office. If the determination is not made within 60 days, the producer will receive a determination for that program year that reflects the determination sought by the producer unless the Deputy Administrator determines that the producer did not follow the farm operating plan that was presented to the county or State committee for such year.

(g) Initial determinations concerning the provisions of this part will not be made by a county FSA office with respect to any farm operating plan that is for a joint operation with six or more members.

(h) Reviews of farming operations and corresponding documentation submitted by program participants may be conducted at any time to determine compliance with applicable statutes and regulations. The completion of such reviews is not subject to the time constraints specified in paragraph (f) of this section.

#### **§ 1400.3 Definitions.**

(a) The terms defined in part 718 of this title are applicable to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions are also applicable to this part:

*Active personal labor* means personally providing physical activities necessary in a farming operation, including activities involved in land preparation, planting, cultivating, harvesting, and marketing of agricultural commodities in the farming operation. Other physical activities include those physical activities required to establish and maintain conserving cover crops on CRP acreages and those physical activities necessary in livestock operations.

*Active personal management* means personally providing and participating in:

(1) The general supervision and direction of activities and labor involved in the farming operation; or

(2) Services (whether performed on-site or off-site) reasonably related and necessary to the farming operation, including:

(i) Supervision of activities necessary in the farming operation, including activities involved in land preparation, planting, cultivating, harvesting, and marketing of agricultural commodities, as well as activities required to establish and maintain conserving cover crops on CRP acreage and activities required in livestock operations;

(ii) Business-related actions, which include discretionary decision making;

(iii) Evaluation of the financial condition and needs of the farming operation;

(iv) Assistance in the structuring or preparation of financial reports or analyses for the farming operation;

(v) Consultations in or structuring of business-related financing arrangements for the farming operation;

(vi) Marketing and promotion of agricultural commodities produced by the farming operation;

(vii) Acquiring technical information used in the farming operation; and

(viii) Any other management function reasonably necessary to conduct the farming operation and for which service the farming operation would ordinarily be charged a fee.

*Administrator* means the Administrator of the Farm Service Agency including any designee of the Administrator.

*Alien* means any person not a citizen or national of the United States.

*Attribution* means the combination of any payment made directly to a person or legal entity with the person's or legal entity's pro rata direct and indirect interest in payments received by a legal entity, joint venture, or general partnership.

*Average Adjusted Gross Farm Income* means the average of the portion of adjusted gross income of the person or legal entity that is attributable to activities related to farming, ranching, or forestry for the 3 taxable years preceding the most immediately preceding complete taxable year.

*Average Adjusted Gross Income* means the average of the adjusted gross income as defined under 26 U.S.C. 62 or comparable measure of the person or legal entity over the 3 taxable years preceding the most immediately preceding complete taxable year.

*Average Adjusted Gross Nonfarm Income* means the difference between the average adjusted gross income for the person or legal entity and the

average adjusted gross farm income for the person or legal entity.

*Capital* means the funding provided by a person or legal entity to the farming operation, independent and separate from all other farming operations, in order for such operation to conduct farming activities. In determining whether a person or legal entity has independently contributed capital, in the form of funding, to the farming operation, such capital must have been derived from a fund or account separate and distinct from that of any other person or legal entity involved in such operation. Capital does not include the value of any labor or management that is contributed to the farming operation or any outlays for land or equipment. A capital contribution must be a direct out-of-pocket input of a specified sum or an amount borrowed by the person or legal entity and does not include advance program payments.

*Chief* means the Chief of the Natural Resources Conservation Service including any designee of the Chief (also referred to in this part as NRCS Chief).

*Contribution* means providing land, capital, or equipment assets, and the actions of providing active personal labor or active personal management to a farming operation in exchange for, or with the expectation of, deriving benefit based solely on the success of the farming operation.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, Farm Service Agency including any designee.

*Equipment* means the machinery and implements needed by the farming operation to conduct activities of the farming operation, including machinery and implements involved in land preparation, planting, cultivating, harvesting, or marketing of the crops involved. Equipment also includes machinery and implements needed to establish and maintain conserving cover crops on CRP acreages and those needed to conduct livestock operations. Such equipment may be leased from any source. If such equipment is leased from another person or legal entity with an interest in the farming operation, such equipment must be leased at a fair market value.

*Family member* means a person to whom another member in the farming operation is related as a lineal ancestor, lineal descendant, sibling, spouse, or otherwise by marriage.

*Farming operation* means a business enterprise engaged in the production of agricultural products, commodities, or livestock, operated by a person, legal entity, or joint operation that is eligible

to receive payments, directly or indirectly, under one or more of the programs specified in § 1400.1. A person or legal entity may have more than one farming operation if such person or legal entity is a member of one or more joint operations.

*Indian tribe* means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601–1629h), which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.

*Interest in a farming operation* means one of the following:

- (1) Owner or renter of the land in the farming operation;
- (2) An interest in the agricultural products, commodities, or livestock produced by the farming operation; or
- (3) A member of a joint operation that either owns or rents land in the farming operation or has an interest in the agricultural products, commodities, or livestock produced by the farming operation.

*Irrevocable trust* means a trust as specified in this definition. Any trust not meeting this definition will be considered a revocable trust. A trust may be considered to be an irrevocable trust only if:

- (1) The trust cannot be modified or terminated by the grantor;
- (2) The grantor has no future, contingent, or remainder interest in the corpus of the trust; and
- (3) The trust agreement does not provide for the transfer of the corpus of the trust to the remainder beneficiary in less than 20 years from the date the trust is established except in cases where the transfer is contingent upon either the remainder beneficiary achieving at least the age of majority or the death of the grantor or income beneficiary.

*Joint operation* means a general partnership, joint venture, or other similar business organization in which the members are jointly and severally liable for the obligations of the organization.

*Land* means farmland that meets the specific requirements of the applicable program. Such land may be leased from any source. If such land is leased from another person or legal entity with an interest in the crop or crop proceeds, such land must be leased at a fair market value.

*Lawful alien* means any person who is not a citizen or national of the United States but who is admitted into the

United States for permanent residence under the Immigration and Nationality Act and possesses a valid Alien Registration Receipt Card issued by the United States Citizenship and Immigration Services, Department of Homeland Security.

*Legal entity* means an entity created under Federal or State law and that:

- (1) Owns land or an agricultural commodity, product, or livestock; or
- (2) Produces an agricultural commodity, product, or livestock.

*Payment* means:

- (1) Payments made in accordance with part 1412 or successor regulation of this chapter;
- (2) CRP annual rental payments made in accordance with part 1410 or successor regulation of this chapter;
- (3) NAP payments made in accordance with part 1437 or successor regulation of this chapter; and
- (4) For other programs, any payments designated in individual program regulations in this chapter.

*Person* means an individual, natural person and does not include a legal entity.

*Public school* means a primary, elementary, secondary school, college, or university that is directly administered under the authority of a governmental body or that receives a predominant amount of its financing from public funds.

*Secretary* means the Secretary of the United States Department of Agriculture.

*Sharecropper* means a person who performs work in connection with the production of the crop under the supervision of the operator and who receives a share of such crop in return for the provision of such labor.

*Significant contribution* means the provision of the following to a farming operation:

- (1)(i) For land, capital, or equipment contributed independently by a person or legal entity, a contribution that has a value at least equal to 50 percent of the person's or legal entity's commensurate share of the total:

- (A) Value of the capital necessary to conduct the farming operation;
- (B) Rental value of the land necessary to conduct the farming operation; or
- (C) Rental value of the equipment necessary to conduct the farming operation; or

- (ii) If the contribution by a person or legal entity consists of any combination of land, capital, and equipment, such combined contribution must have a value at least equal to 30 percent of the person's or legal entity's commensurate share of the total value of the farming operation;

(2) For active personal labor, an amount contributed by a person to the farming operation that is described by the smaller of the following:

- (i) 1,000 hours per calendar year; or
- (ii) 50 percent of the total hours that would be necessary to conduct a farming operation that is comparable in size to such person's or legal entity's commensurate share in the farming operation;

(3) With respect to active personal management, activities that are critical to the profitability of the farming operation, taking into consideration the person's or legal entity's commensurate share in the farming operation; and

(4) With respect to a combination of active personal labor and active personal management, when neither contribution by itself meets the requirement of paragraphs (2) and (3) of this definition, a combination of active personal labor and active personal management that, when made together, results in a critical impact on the profitability of the farming operation in an amount at least equal to either the significant contribution of active personal labor or active personal management as defined in paragraphs (2) and (3) of this definition.

*Substantial amount of active personal labor* means the provision of active personal labor to a farming operation in an amount described by the smaller of the following:

- (1) 1,000 hours per calendar year; or
- (2) 50 percent of the total hours that would be necessary to conduct a farming operation that is comparable in size to the person's or legal entity's commensurate share in the farming operation.

*Total value of the farming operation* means the total of the costs, excluding the value of active personal labor and active personal management contributed by a person who is a member of the farming operation, needed to carry out the farming operation for the year for which the determination is made.

#### § 1400.4 Indian Tribe.

Provisions of this part do not apply to Indian tribes as defined in § 1400.3.

#### § 1400.5 Denial of program benefits.

(a) All or any part of a payment otherwise due a person or legal entity on all farms in which the person or legal entity has an interest may be withheld or be required to be refunded if the person or legal entity fails to comply with the provisions of this part.

(b) All or any part of a payment otherwise due a person or legal entity on all farms in which the person or legal entity has an interest may be withheld

or be required to be refunded if the person or legal entity fails to comply with the provisions of this part and adopts or participates in adopting a scheme or device designed to evade this part, or that has the effect of evading this part. Such acts may include, but are not limited to:

(1) Concealing information that affects the application of this part;

(2) Submitting false or erroneous information; or

(3) Creating a business arrangement using rental agreements and other arrangements to conceal the interest of a person or legal entity in a farm or farming operation for the purpose of obtaining program payments the person or legal entity would otherwise not be eligible to receive. Indicators of such business arrangement include, but are not limited to the following:

(i) No crops are grown or agricultural commodities produced by the represented operation;

(ii) The represented operation has no appreciable assets;

(iii) The only source of capital for the operation is the program payments; or

(iv) The represented operation exists only for the receipt of program payments.

(c) If the Deputy Administrator determines that a person or legal entity has adopted a scheme or device to evade, or that has the purpose of evading, the provisions of 7 U.S.C. 1308, 1308-1, or 1308-3, as amended, such person or legal entity will be ineligible to receive payments under the programs specified in § 1400.1 in the year for such scheme or device was adopted and the succeeding year.

(d) A person or legal entity that perpetuates a fraud, commits fraud, or participates in equally serious actions for the benefit of the person or legal entity, or the benefit of any other person or legal entity, to exceed the applicable limit on payments or the requirements of this part will be subject to a five-year denial of all program benefits. Such other equally serious actions may include, but are not limited to:

(1) Knowingly engaged in, or aided in the creation of a fraudulent document;

(2) Failed to disclose material information relevant to the administration of the provisions of this part, or

(3) Any other actions of a person or legal entity determined by the Deputy Administrator as designed or intended to circumvent the provisions of this subpart.

(e) Program payments and benefits will be denied on pro-rata basis:

(1) In accordance to the interest held by the person or legal entity in any other legal entity or joint operations and

(2) To any person or legal entity that is a cash rent tenant on land owned or under control of a person or legal entity for which a determination of this section has been made.

#### **§ 1400.6 Joint and several liability.**

(a) Any legal entity, including joint ventures and general partnerships, and any member of a legal entity determined to have knowingly participated in a scheme or device, or other such equally serious actions to evade the payment limitation provisions, or that has the purpose of evading the provisions of this part, will be jointly and severally liable for any amounts determined to be payable as the result of the scheme or device, or other such equally serious actions, including amounts necessary to recover the payments.

(b) Any person or legal entity that cooperates in the enforcement of the payment limitation and payment eligibility provisions of this part may be partially or fully released from liability, as determined by the Executive Vice President, CCC.

(c) The provisions of this section will be applicable in addition to any liability that arises under a criminal or civil statute.

#### **§ 1400.7 Commensurate contributions and risk.**

(a) In order to be considered eligible to receive payments under the programs specified in § 1400.1, a person or legal entity specified in §§ 1400.202 through 1400.210 must have:

(1) A share of the profits or losses from the farming operation commensurate with the person's or legal entity's contribution(s) to the operation;

(2) Contribution(s) to the farming operation that are at risk for a loss; and

(3) Risk that is commensurate with the person's or legal entity's claimed share of the farming operation.

(b) [Reserved]

#### **§ 1400.8 Equitable treatment.**

(a) Actions taken by a person or legal entity in good faith based on action or advice of an authorized representative of the Administrator may be accepted as meeting the requirements of this part to the extent the Administrator deems necessary to provide fair and equitable treatment to such person or legal entity.

(b) Actions taken by a person or legal entity in good faith based on action or advice of an authorized representative of the NRCS Chief may be accepted as meeting the requirements of this part to the extent the NRCS Chief deems

necessary to provide fair and equitable treatment to such person or legal entity.

#### **§ 1400.9 Appeals.**

(a) A person or legal entity may obtain reconsideration and review of determinations made under this part in accordance with the appeal regulations set forth in part 780 of this title. With respect to such appeals, the applicable reviewing authority will:

(1) Schedule a hearing with respect to the appeal within 45 days following receipt of the written appeal and

(2) Issue a determination within 60 days following the hearing.

(b) The time limitations provided in paragraph (a) will not apply if:

(1) The appellant, or the appellant's representative, requests a postponement of the scheduled hearing;

(2) The appellant, or the appellant's representative, requests additional time following the hearing to present additional information or a written closing statement;

(3) The appellant has not timely presented information to the reviewing authority; or

(4) An investigation by the Office of Inspector General is ongoing or a court proceeding is involved that affects the amount of payments a person may receive.

(c) If the deadlines provided in paragraphs (a) and (b) of this section are not met, the relief sought by the producer's appeal will be granted for the applicable crop year unless the Deputy Administrator determines that the producer did not follow the farm operating plan initially presented to the county committee for the year that is the subject of the appeal.

(d) An appellant may waive the provisions of paragraphs (a) and (b) of this section.

#### **Subpart B—Payment Limitation**

##### **§ 1400.100 Revocable trust.**

A revocable trust and the grantor of the trust will be considered to be the same person.

##### **§ 1400.101 Minor children.**

(a) Except as provided in paragraph (b) of this section, payments received by a child under 18 years of age as of April 1 of the applicable crop, program, or fiscal year, including such a person who is the beneficiary of a trust or who is an heir of an estate, will be attributed for the entire crop, program, or fiscal year to the parent receiving the greater amount of program payments subject to this part or to any court-appointed person such as a guardian or conservator who is responsible for the minor.

(b) Payments received by a minor will not be attributed to the minor's parent or to any court-appointed person such as a guardian or conservator who is responsible for the minor if all of the following apply:

(1) The minor is a producer on a farm and the minor's parents or any court-appointed person such as guardian or conservator who is responsible for the minor, does not have any interest in the farm;

(2) The minor has established and maintains a separate household from the minor's parents or any court-appointed person such as a guardian or conservator who is responsible for the minor, and such minor personally carries out the farming activities with respect to the minor's farming operation for which there is a separate accounting; and

(3) The minor does not live in the same household as such minor's parents and:

(i) Is represented by a court-appointed guardian or conservator who is responsible for the minor and

(ii) Ownership of the farm is vested in the minor.

(c) A person will be considered to be a minor until the age 18 is reached. Court proceedings conferring majority on a person under 18 years of age will not change such person's status as a minor.

#### **§ 1400.102 States, political subdivisions, and agencies thereof.**

(a) A State, political subdivision, and agency thereof, is not eligible for payments or benefits under programs specified in § 1400.1, unless the exception provided in paragraph (b) of this section applies.

(b) Subject to the limitation in paragraph (c) of this section, a State, political subdivision, and any agency thereof, may receive payments or benefits under programs specified in § 1400.1 if both of the following apply:

(1) The land for which payments are received is owned by the State, political subdivision, or agency thereof and

(2) The payments are used solely for the support of public schools;

(c) The total payments described in paragraph (b) of this section cannot exceed \$500,000 annually except with respect to payments made with respect to the following States: Alaska, Delaware, Hawaii, Idaho, Maine, Montana, North Dakota, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming. The list of States that meet the criteria in paragraph (c) of this section may change due to changes in population of any State.

#### **§ 1400.103 Charitable organizations.**

(a) A charitable organization, including a club, society, fraternal organization, or religious organization will be considered a separate legal entity for payment limitation purposes to the extent that such an entity is independently engaged in the production of crops, agricultural commodities, or livestock, except where the land or the proceeds from the farming operation may transfer to a legal entity that exercises control or authority over such organization.

(b) If the land or the proceeds from the farming operation may transfer to a legal entity that exercises control or authority over the charitable organization, payments to the charitable organization will be attributed to the parent organization.

#### **§ 1400.104 Changes in farming operations.**

(a) Any change in a farming operation that would increase the number of persons or legal entities to which the provisions of this part apply must be bona fide and substantive. If bona fide, the following will be considered to be a substantive change in the farming operation:

(1) The addition of a family member to a farming operation in accordance with § 1400.208, except that such an addition will not affect the status of any other person or legal entity that is added to the farming operation;

(2) With respect to a landowner only, a change from a cash rent to a share rent;

(3) An increase through the acquisition of base acres not previously involved in the farming operation of at least 20 percent or more in the total base acres involved in the farming operation.

(i) For the purpose of payment limitations, such an increase in base acres will be considered an applicable bona fide and substantive change for the increase of only one person or legal entity to the farming operation, unless;

(ii) A representative of the State FSA office determines, based on the magnitude and complexity of the change represented, the increase in base acres supports additional persons or legal entities to the farming operation.

(4) A change in ownership by sale or gift of equipment from a person or legal entity previously engaged in a farming operation to a person or legal entity that has not been involved in such operation. The sale or gift of equipment will be considered to be bona fide and substantive only if:

(i) The transferred amount of such equipment is commensurate with the new person's or legal entity's share of the farming operation,

(ii) The sale or gift of the equipment was based on the equipment's fair market value,

(iii) The former owner of the equipment has no control over such equipment,

(iv) The transaction was not financed by the former owner, and

(v) Preference was not given to the former owner to re-purchase the equipment at a later date.

(5) A change in ownership by sale or gift of land from a person or legal entity who previously has been engaged in a farming operation to a person or legal entity that has not been involved in such operation. The sale or gift of land will be considered to be bona fide and substantive only if:

(i) The transferred amount of such land is commensurate with the new person's or legal entity's share of the farming operation,

(ii) The sale or gift of land was based on the land's fair market value,

(iii) The former owner of the land has no control over such land,

(iv) The transaction was not financed by the former owner, and

(v) Preference was not given to the former owner to re-purchase the land at a later date.

(b) Unless the requirements in paragraph (a) of this section are met, the increase in persons or legal entities in the farming operation will not be recognized for payment limitation purposes and the additional persons or legal entities are not eligible for program payment identified in § 1400.1 otherwise resulting from the farming operation.

#### **§ 1400.105 Attribution of payments.**

(a) A payment made directly to a person or legal entity will be combined with the pro rata interest of the person or legal entity in payments received by a legal entity in which the person or legal entity has a direct or indirect ownership interest, unless the payments of the legal entity have been reduced by the pro rata share of the person or legal entity.

(b) A payment made to a legal entity will be attributed to those persons who have a direct and indirect ownership interest in the legal entity, unless the payment of the legal entity has been reduced by the pro rata share of the person.

(c) Attribution of payments made to legal entities will be tracked through four levels of ownership in legal entities as follows:

(1) First level of ownership—any payment made to a legal entity that is owned in whole or in part by a person will be attributed to the person in an

amount that represents the direct ownership interest in the first-tier or payment legal entity;

(2)(i) Second level of ownership—any payment made to a first-tier legal entity that is owned in whole or in part by another legal entity (referred to as a second-tier legal entity) will be attributed to the second-tier legal entity in proportion to the ownership of the second-tier legal entity in the first-tier legal entity;

(ii) If the second-tier legal entity is owned in whole or in part by a person, the amount of the payment made to the first-tier legal entity will be attributed to the person in the amount that represents the indirect ownership in the first-tier legal entity by the person.

(3) Third and fourth levels—except as provided in paragraph (2)(ii) of this section, any payments made to a legal entity at the third and fourth tiers of ownership will be attributed in the same manner as specified in paragraph (2)(i) of this section.

(4) Fourth-tier ownership—if the fourth-tier of ownership is that of a legal entity and not that of a person, a reduction in payment will be applied to the first-tier or payment legal entity in the amount that represents the indirect ownership in the first-tier or payment legal entity by the fourth-tier legal entity.

(d) For purposes of administering direct attribution, and to determine a person's or legal entity's ownership interest in a legal entity that receives a payment subject to limitation; the ownership interest on June 1 of each year will be used.

(e) Direct attribution of payments is not applicable to a cooperative association of producers with respect to commodities produced by the members of the association that are marketed by the association on behalf of the members of the association. The payments will instead be attributed to the producers as persons.

#### **§ 1400.106 Payment limits.**

(a) Payments made to a person or legal entity will not exceed the amounts specified in subpart A of this part.

(b) Payments made to a joint venture or general partnership cannot exceed, for each payment specified in subpart A of this part, the amount determined by multiplying the maximum payment amount specified in subpart A of this part by the number of persons and legal entities, other than joint ventures and general partnerships, that comprise the ownership of the joint venture or general partnership.

(c) Payments made to a legal entity will be reduced proportionately by an

amount that represents the direct or indirect ownership in the legal entity by any person or legal entity that has otherwise reached the applicable maximum payment limitation.

#### **§ 1400.107 Notification of interests.**

(a) In order to be eligible to receive any payment specified in subpart A of this part, or any other program as provided in individual program regulations in this chapter, a person or legal entity must, provide information in the manner as prescribed by the Deputy Administrator.

(b) The information required to be submitted under paragraph (a) of this section must include:

(1) The name and social security number of each person, or the name and taxpayer identification number of each legal entity, that holds or acquires an ownership interest in the legal entity and

(2) The name and taxpayer identification number of each legal entity in which the person or legal entity holds an ownership interest.

#### **Subpart C—Payment Eligibility**

##### **§ 1400.201 General provisions for determining whether a person or legal entity is actively engaged in farming.**

(a) To be considered eligible to receive payments with respect to a particular farming operation, a person or legal entity must be actively engaged in farming with respect to such operation.

(b) Actively engaged in farming means, except as otherwise provided in this part, that the person or legal entity:

(1) Independently and separately makes a significant contribution to a farming operation of:

(i) Capital, equipment, or land, or a combination of capital, equipment, or land and

(ii) Active personal labor or active personal management, or a combination of active personal labor and active personal management;

(2) Has a share of the profits or losses from the farming operation commensurate with the person's or legal entity's contributions to the operation; and

(3) Makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the person's or legal entity's claimed share of the farming operation.

(c) All of the following factors will be taken into consideration in determining if the person or legal entity is independently and separately contributing a significant amount of capital, equipment, or land, or a combination of capital, equipment, or land, to the farming operation:

(1) A separate and distinct interest in the land, crop, and livestock involved in the farming operation;

(2) The demonstration of separate and total responsibility for the interest in the land, crop, and livestock in the farming operation; and

(3) All funds and business accounts of the farming operation are separate from that of any other person and legal entity.

(d) In determining if the person or legal entity is independently and separately contributing a significant amount of active personal labor or active personal management, all of the following factors will be taken into consideration:

(1) The types of crops and livestock produced by the farming operation;

(2) The normal and customary farming practices of the area;

(3) The total amount of labor and management necessary for such a farming operation in the area; and

(4) Whether the person or legal entity receives compensation for the labor and management activities.

##### **§ 1400.202 Persons.**

(a) A person will be considered to be actively engaged in farming with respect to a farming operation if:

(1) The person independently and separately makes a significant contribution to a farming operation of:

(i) Capital, equipment, or land, or a combination of capital, equipment, or land and

(ii) Active personal labor or active personal management, or a combination of active personal labor and active personal management;

(2) Has a share of the profits or losses from the farming operation commensurate with the person's or legal entity's contributions to the operation; and

(3) Makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the person's or legal entity's claimed share of the farming operation.

(b) If one spouse, or an estate of a deceased spouse, is determined to be actively engaged in farming as specified in paragraph (a) of this section, the other spouse is considered to have made a significant contribution, as specified in paragraph (a)(1)(ii) of this section, only to the same farming operation.

(c) If a farming operation is conducted by a person, and the capital, land, or equipment is contributed by the person, such capital, land, or equipment:

(1) Must be contributed directly by the person and must not be acquired as a result of a loan made to, guaranteed, co-signed, or secured by:

(i) Any other person, joint operation, or legal entity that has an interest in such farming operation;

(ii) Such person, joint operation, or legal entity by any other person, joint operation, or legal entity that has an interest in such farming operation or

(iii) Any other person, joint operation, or legal entity in whose farming operation such person, joint operation, or legal entity has an interest; and

(2) If acquired as a loan made to, guaranteed, co-signed, or secured by the persons, joint operations, or legal entities, the loan must:

(i) Bear the prevailing interest rate and

(ii) Have a repayment schedule considered reasonable and customary for the area.

#### **§ 1400.203 Joint operations.**

(a) A member of a joint operation will be considered to be actively engaged in farming with respect to a farming operation if the member:

(1) Makes a significant contribution of:

(i) Capital, equipment, or land or a combination of capital, equipment, or land and

(ii) Active personal labor or active personal management, or a combination of active personal labor and active personal management, and that are:

(A) Performed on a regular basis,

(B) Identifiable and documentable, and

(C) Separate and distinct from such contributions of any other member of the farming operation;

(2) Has a share of the profits or losses from the farming operation commensurate with the member's contributions to the operation; and

(3) Makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the member's claimed share of the farming operation.

(b) For a farming operation conducted by a joint operation in which the capital, land, or equipment is contributed by such joint operation, such capital, land, or equipment:

(1) Must be contributed directly by the joint operation and must not be acquired as a loan made to, guaranteed, co-signed, or secured by:

(i) Any person, legal entity, or other joint operation that has an interest in such farming operation, including either joint operation's members;

(ii) Such joint operation by any person, legal entity, or other joint operation that has an interest in such farming operation; or

(iii) Any person, legal entity, or other joint operation in whose farming

operation such joint operation has an interest, and

(2) If acquired as a result of a loan made to, guaranteed, co-signed, or secured by the persons, legal entities, or joint operations with an interest in the operation as defined, the loan must:

(i) Bear the prevailing interest rate and

(ii) Have a repayment schedule considered reasonable and customary for the area.

(c) If a joint operation separately makes a significant contribution of capital, equipment, or land, or a combination of capital, equipment, or land, and the joint operation meets the provisions of § 1400.201(b)(2) and (b)(3), the members of the joint operation who make a significant contribution of active personal labor, active personal management, or a combination of active personal labor and active personal management to the farming operation as specified in paragraph (a)(1)(ii) of this section will be considered to be actively engaged in farming with respect to such farming operation.

#### **§ 1400.204 Limited partnerships, limited liability partnerships, limited liability companies, corporations, and other similar legal entities.**

(a) A limited partnership, limited liability partnership, limited liability company, corporation, or other similar legal entity will be considered to be actively engaged in farming with respect to a farming operation if:

(1) The legal entity independently and separately makes a significant contribution to the farming operation of capital, equipment, or land, or a combination of capital, equipment, or land;

(2) Each partner, stockholder, or member with an ownership interest makes a contribution, whether compensated or not compensated, of active personal labor, active personal management, or a combination of active personal labor and active personal management to the farming operation; that are:

(i) Performed on a regular basis;

(ii) Identifiable and documentable; and

(iii) Separate and distinct from such contributions of any other partner, stockholder or member of the farming operation;

(3) The contribution of the partners, stockholders and members is significant and commensurate;

(4) The legal entity has a share of the profits or losses from the farming operation commensurate with the legal entity's contributions to the operation; and

(5) The legal entity makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the legal entity's claimed share of the farming operation.

(b) If any partner, stockholder, or member fails to meet the requirements in paragraph (a)(2) of this section, any program payment and benefit subject to this subpart provided to the legal entity will be reduced by an amount commensurate with the ownership share held by that partner, stockholder, or member in the legal entity.

(c) For a farming operation conducted by a legal entity in which the capital, land, or equipment is contributed by the legal entity, such capital, land, or equipment:

(1) Must be contributed directly by the legal entity and must not be acquired as a loan made to, guaranteed, co-signed, or secured by:

(i) Any person, legal entity, or joint operation that has an interest in such farming operation, including the legal entity's members;

(ii) Such joint operation by any person, legal entity, or other joint operation that has an interest in such farming operation; or

(iii) Any person, legal entity, or joint operation in whose farming operation such legal entity has an interest, and

(2) If acquired as a result of a loan made to, guaranteed, co-signed, or secured by the persons, legal entities, or joint operations as defined, the loan must:

(i) Bear the prevailing interest rate and

(ii) Have a repayment schedule considered reasonable and customary for the area.

#### **§ 1400.205 Trusts.**

A trust will be considered to be actively engaged in farming with respect to a farming operation if:

(a) The trust independently and separately makes a significant contribution to the farming operation of capital, equipment, or land, or a combination of capital, equipment, or land;

(b) The income beneficiaries collectively make a significant contribution of active personal labor or active personal management, or a combination of active personal labor and active personal management to the farming operation. The combined interest of all the income beneficiaries providing active personal labor or active personal management, or a combination of active personal labor and active personal management, must be at least 50 percent;

(c) The trust has a share of the profits or losses from the farming operation commensurate with the legal entity's contributions to the operation;

(d) The trust makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the legal entity's claimed share of the farming operation;

(e) The trust has provided a tax identification number of the trust unless the trust is a revocable trust and the grantor is the sole income beneficiary; and

(f) The trust has provided a copy of the trust agreement to the county committee unless the trust is a revocable trust.

#### **§ 1400.206 Estates.**

(a) For 2 program years after the program year in which a person dies, the person's estate will be considered to be actively engaged in farming if:

(1) The estate, as a legal entity, makes a significant contribution of either:

- (i) Capital, equipment, or land or
- (ii) A combination of capital, equipment, or land; and

(2) The personal representative or heirs of the estate collectively make a significant contribution of either:

- (i) Active personal labor or active personal management or
- (ii) The combination of active personal labor and active personal management; and

(3) The estate has a share of the profits or losses from the farming operation commensurate with the legal entity's contributions to the operation;

(4) The estate makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the legal entity's claimed share of the farming operation; and

(5) The representative of the estate has provided a tax identification number for the estate and a copy of a court order, will, or other legal document that identifies the heir(s) and tax identification number(s) of the heir(s).

(b) After the period set forth in paragraph (a) of this section, the deceased person's estate will not be considered to be actively engaged in farming unless, on a case by case basis, the Deputy Administrator determines, for the purpose of obtaining program payments, that the estate has not been settled.

#### **§ 1400.207 Landowners.**

(a) A person or legal entity that is a landowner, including landowners with an undivided interest in land, making a significant contribution of owned land to the farming operation, will be

considered to be actively engaged in farming with respect to such owned land, if the landowner:

(1) Receives rent or income for such use of the land based on the land's production or the operation's operating results;

(2) Has a share of the profits or losses from the farming operation commensurate with the landowner's contributions to the operation; and

(3) Makes contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with the landowner's claimed share of the farming operation.

(b) A landowner also includes a member of a joint operation if the joint operation holds title to land in the name of the joint operation and if the joint operation or its members submit adequate documentation to determine that, upon dissolution of the joint operation, the title to the land owned by the joint operation will revert to such member of such joint operation.

#### **§ 1400.208 Family members.**

(a) Notwithstanding the provisions of §§ 1400.201 through 1400.206, with respect to a farming operation conducted by persons, a majority of whom are family members, an adult family member who makes a significant contribution of active personal labor, active personal management, or a combination of active personal labor and active personal management will be considered to be actively engaged in farming if the adult family member meets the provisions in paragraph (b) of this section.

(b) An adult family member who elects to be considered actively engaged in farming under this section must:

(1) Have a share of the profits or losses from the farming operation commensurate with such person's contributions to the operation and

(2) Make contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with such person's claimed share of the farming operation.

#### **§ 1400.209 Sharecroppers.**

(a) Notwithstanding the provisions of §§ 1400.201 through 1400.206 of this part, with respect to a person who is a sharecropper, such person will be considered to be actively engaged in farming if the sharecropper meets the provisions of paragraph (b) of this section.

(b) A sharecropper who elects to be considered actively engaged in farming under this section must:

(1) Make a significant contribution of active personal labor to the farming operation;

(2) Have a share of the profits or losses from the farming operation commensurate with such person's contribution to the operation; and

(3) Make a contribution to the farming operation that is at risk for a loss, with the level of risk being commensurate with such person's claimed share of the farming operation.

#### **§ 1400.210 Deceased and incapacitated persons.**

If the person dies or is incapacitated before a determination is made that the person is "actively engaged in farming," the representative of the deceased person's estate or the incapacitated person, or other person if necessary, must provide the determining authority information to verify that such person did make a conscious effort to and would have been determined to be actively engaged in farming if not for the person's death or incapacitation. If the person dies or is incapacitated after being determined to be "actively engaged in farming," the determining authority will allow such determination to be in effect for that program year or fiscal year, as applicable. However, the following year such person or the person's estate must meet all necessary requirements in order to be determined to be "actively engaged in farming" for that year.

#### **§ 1400.211 Persons and legal entities not considered to be actively engaged in farming.**

Any person or legal entity that does not satisfy all of the applicable provisions of §§ 1400.201 through 1400.210 and a landowner who rents land to a farming operation for cash or a crop share guaranteed as to the amount of the commodity will not be considered to be actively engaged in farming with respect to the farming operation.

#### **§ 1400.212 Growers of hybrid seed.**

The existence of a hybrid seed contract for a person or legal entity will not be taken into account when making an actively engaged in farming determination with respect to such person or legal entity. However, such person or legal entity must satisfy all other applicable provisions of this part.

#### **§ 1400.213 Military personnel.**

If a person is called to active duty in the military before a determination is made that the person is actively engaged in farming, the person may be considered to be actively engaged in farming if the determining authority determines that such person did make a conscious effort to, and would have been determined to be, actively engaged



in farming if the person would not have been called to active duty. If the person is called to active duty after being determined to be actively engaged in farming, such determination will remain in effect for the program year.

#### **Subpart D—Cash Rent Tenants**

##### **§ 1400.301 Eligibility.**

(a) Any tenant that is actively engaged in farming in accordance with the provisions of subpart C and conducts a farming operation in which the tenant rents the land for cash, for a crop share guaranteed as to the amount of the commodity, or by any arrangement in which the tenant does not compensate the landlord by cash or a crop share, and receives benefits, with respect to such land under a program specified in § 1400.1(a)(1) and (2) will not be eligible to receive any payment with respect to such cash-rented land unless the tenant independently makes a significant contribution to the farming operation of:

- (1) Active personal labor or
- (2) Significant contributions of both active personal management and equipment.

(b) If the equipment is leased by the tenant from:

- (1) The landlord, then the lease must reflect the fair market value of the equipment leased with a payment schedule considered reasonable and customary for the area or
- (2) The same person or legal entity that is providing hired labor to the farming operation, then the contracts for the lease of the equipment and for the hired labor must be two separate contracts.

(c) If the equipment is leased by the tenant from the landlord, or from the same person or legal entity that is providing hired labor to the farming operation, then the tenant must exercise complete control over the leased equipment during the entire current crop year. Complete control is defined as exclusive access and use by the tenant.

(d) If the cash rent tenant is a joint operation, then each member must make a significant contribution of active personal labor or active personal management as specified in § 1400.203(a)(1)(ii) to be considered eligible for the member's share of the program payments received by the joint operation on the cash rented land.

(e) If the cash rent tenant is a legal entity, then a significant contribution of active personal labor or active personal management must be made to the legal entity as specified in § 1400.204(a)(2) for the legal entity to be considered eligible

for the program payments on the cash rented land.

#### **Subpart E—Foreign Persons**

##### **§ 1400.401 Eligibility.**

(a) Any person who is not a citizen of the United States or a lawful alien will be ineligible to receive payments, loans, and benefits, with respect to any commodity produced, or land set aside from production, on a farm that is owned or operated by such person unless such person is providing land, capital, and a substantial amount of active personal labor on such farm.

(b)(1) A corporation or other legal entity will be ineligible to receive payments, loans, and benefits if more than 10 percent of the ownership of the legal entity is held by persons who are not citizens of the United States or lawful aliens unless each foreign person who is a stockholder or other type of member provides a substantial amount of active personal labor in the production of crops on a farm owned or operated by such a legal entity. However, upon the written request of the legal entity, the Deputy Administrator may make payments in an amount determined by the Deputy Administrator to be representative of the percentage interest of the legal entity that is owned by citizens of the United States and lawful aliens or foreign stockholders or other type of member who provide a significant contribution of active personal labor in the production of crops on a farm owned or operated by such legal entity.

(2) In determining whether more than 10 percent of the ownership of a legal entity is held by persons who are not citizens of the United States or by lawful aliens, the ownership interest will be the higher of the amount of such interest on:

- (i) The date the applicable program contract or agreement is executed by the legal entity or
- (ii) Any other date prior to the final harvest date that is determined and announced by the Deputy Administrator to be normal in the area for the applicable program crop.

(3) A corporation or other legal entity must inform the county committee of any increase in such ownership that occurs after the applicable program contract or agreement is executed.

(4) In the event of an increase in such ownership after a payment, loan, or benefit has been made, the legal entity will refund such payment, loan, or benefit.

(5) Where there is only one class of stock or other similar unit of ownership, a person's or legal entity's percentage

share of the limited partnership, corporation, or other similar legal entity will be based upon the outstanding shares of stock or other similar unit of ownership held by the person or legal entity as compared to the total outstanding shares of stock or other similar unit of ownership. If the limited partnership, corporation, or other similar legal entity has more than one class of stock or other unit of ownership, the percentage share of the limited partnership, corporation or other similar legal entity owned by a person or legal entity will be determined by the Deputy Administrator on the basis of market quotations. If market quotations are unavailable or so infrequent that they do not represent fair market value, such percentage share will be determined by the Deputy Administrator on the basis of all relevant factors affecting the fair market value of such stock or other unit of ownership, including the various rights and privileges that are attributed to each such class.

(c) A citizen of the United States, lawful alien, or legal entity that is not subject to this part who is in lawful possession, through a lease or otherwise, of a farm owned by a person or legal entity who is subject to this part may receive a payment, loan, and benefit without regard to this part.

##### **§ 1400.402 Notification.**

(a) Any legal entity, whether foreign or domestic, that executes a program contract or agreement under which a payment, loan, or benefit may be available must provide written notification to the county committee in the county where the legal entity conducts its farming operation if:

- (1) Any person, group of persons, legal entity, or group of legal entities holds more than a 10 percent interest in such legal entity; and
- (2) Such person, group of persons, legal entity, or group of legal entities, in accordance with § 1400.401, are ineligible to receive a payment, loan, or benefit.

(b) Such written notification must include the name and social security number or taxpayer identification number of such a person or legal entity, if known, and of all persons and legal entities that hold an interest in the legal entity.

(c) The failure of the legal entity to provide this information will result in the ineligibility of the legal entity to receive any payment, loan, or benefit.



**Subpart F—Average Adjusted Gross Income Limitation****§ 1400.500 Applicability.**

(a) For the 2009 through 2012 crop, program, or fiscal years, a person or legal entity, other than a joint venture or general partnership, will not be eligible to receive, directly or indirectly, certain program payments or benefits described in § 1400.1 if the average adjusted gross income of the person or legal entity exceeds the amounts in paragraphs (b) through (d) of this section for the 3 taxable years preceding the most immediately preceding complete taxable year, as determined by the Deputy Administrator.

(b) For 2009 through 2012 commodity programs set forth in § 1400.1, a person or legal entity with an average adjusted gross nonfarm income as defined in § 1400.3 that exceeds \$500,000 will not be eligible to receive program payments or benefits as identified in § 1400.1.

(c) For 2009 through 2012 commodity programs set forth in § 1400.1, a person or legal entity that has an average adjusted gross farm income as defined in § 1400.3 that exceeds \$750,000 will not be eligible to receive a direct payment and other payments made applicable by statute or regulation.

(d) For 2009 through 2012 conservation programs set forth in § 1400.1, a person or legal entity that has an average adjusted gross nonfarm income as defined in § 1400.3 that exceeds \$1,000,000 will not be eligible to receive payments or benefits under conservation and related programs, and other programs made applicable by statute or regulation, unless:

(1) Not less than 66.66 percent of the of the average adjusted gross income of the person or legal entity is average adjusted gross farm income or

(2) This limitation may be waived on a case-by-case basis by the Administrator or NRCS Chief for the protection of environmentally sensitive land of special significance. Such a written waiver request must document that land within or adjacent to the producer's agricultural operation contains critical resources such as, but not limited to, threatened, endangered, or at-risk species; historical or cultural resources; unique wetlands; or critical groundwater recharge areas. In addition, the waiver request must either:

(i) Show that use of conservation program funding by an individual producer is critical to the success of a project that benefits multiple producers in a community, watershed, or other geographic area or

(ii) Achieve enduring conservation treatment through use of a long-term

agreement that is greater than 15 years in duration or through use of a deed restriction on the land.

(e) Determinations made under this subpart with regard to conservation programs will be based on the year for which the conservation program contract or agreement is approved and the determination will apply for the entire term of the subject agreement or contract.

(f) Vendors that receive payment for technical services provided in conjunction with programs made subject to this subpart by regulation or statute, but who are not beneficiaries of the program, are not subject to this subpart for services that are of the type that are also performed by the Federal Government in connection with such programs.

(g) Payments to an escrow agent, or other legal entity of similar capacity in which the recipient is maintaining temporary custody of the funds for eventual disbursement to an eligible program participant, are not subject to this subpart so long as the party ultimately receiving the payment is eligible under this subpart.

(h) Payments to States, counties, political subdivisions and agencies thereof, and Indian tribes as defined in § 1400.3 are not subject to this subpart.

**§ 1400.501 Determination of average adjusted gross income.**

(a) Except as otherwise provided in this subpart, average adjusted gross farm income of a person or legal entity includes income or benefits derived from or related to the following:

(1) Production of crops, specialty crops, and unfinished raw forestry products;

(2) The production of livestock, including but not limited to, cattle, elk, reindeer, bison, horses, deer, sheep, goats, swine, poultry, fish and other aquaculture products used for food, honeybees, and products produced by, or derived from, livestock;

(3) The production of farm-based renewable energy;

(4) The sale, including the sale of easements and development rights, of farm, ranch, forestry land, water or hunting rights, or environmental benefits;

(5) The rental or lease of land or equipment, used for farming, ranching, or forestry operations, including water or hunting rights;

(6) The processing, packing, storing, shedding, and transporting of farm, ranch, and forestry commodities, including renewable energy;

(7) The feeding, rearing, or finishing of livestock;

(8) The sale of land that has been used for agriculture;

(9) Any payment or benefit, including benefits from risk management practices, crop insurance indemnities, and catastrophic risk protection plans;

(10) Payments and benefits authorized under any program made applicable to this subpart by statute or regulation;

(11) Any other activity related to farming, ranching, or forestry, as determined by the Deputy Administrator; and,

(12) Any income reported on the Schedule F or other schedule used by the person or legal entity to report income from farming, ranching, or forestry operations to the Internal Revenue Service.

(b) For the specific purpose of determining the average adjusted gross farm income under § 1400.500(d)(1), and in addition to § 1400.501(a), the average adjusted gross farm income of a person or legal entity includes income or benefits derived from the following:

(1) The sale of equipment to conduct farm, ranch, or forestry operations and

(2) The provision of production inputs and services to farmers, ranchers, foresters, and farm operations.

(c) Except as otherwise provided in this subpart, adjusted gross income means:

(1) For a person filing a separate tax return, the amount reported as "adjusted gross income" on the final federal income tax return for the person for the applicable tax year;

(2) For a person filing a joint tax return, the amount reported as "adjusted gross income" on the final federal income tax return for the applicable tax year unless a certified statement is provided by a certified public accountant or attorney specifying the manner in which such income would have been declared and reported if the persons had filed two separate returns and that this calculation is consistent with the information supporting the filed joint return;

(3) For a corporation, including a subchapter S corporation, the total reported "taxable income" as reported to the Internal Revenue Service plus the amount of the charitable contributions as reported on the final federal income tax return for the applicable tax year;

(4) For a tax exempt legal entity, the "unrelated business taxable income" of the legal entity as reported to the Internal Revenue Service on the final federal income tax return, less any other income CCC determines to be from non-commercial activities;

(5) For a limited liability company, limited partnership, limited liability partnership, or similar type of

organization, the income from trade or business activities plus the amount of guaranteed payments to the members as reported to the Internal Revenue Service on the final federal income tax return for the applicable tax year; and

(6) For an estate or trust, the adjusted total income plus charitable deductions as reported to the Internal Revenue Service on the final federal income tax return for the applicable tax year, or the amount of net increase in the estate's or trust's value resulting from its business or investment interests.

(d) For purposes of applying this subpart and calculating the 3-year average referenced in § 1400.500, that average will be for the adjusted gross income for the 3 taxable years preceding the most immediately preceding complete taxable year, as determined by CCC. For a legal entity that is not required to file a federal income tax return, or a person or legal entity that did not have taxable income in one or more tax years, the average will be the adjusted gross income, including losses, averaged for the 3 taxable years preceding the most immediately preceding complete taxable year, as determined by CCC. A new legal entity will have its adjusted gross income averaged only for those years of the base period for which it was in business; however, a new legal entity will not be considered "new" to the extent it takes over an existing operation and has any elements of common ownership or interests with the preceding legal entity, or with persons or legal entities with an interest in the "old" legal entity. When there is such commonality, income of the "old" legal entity will be averaged with that of the "new" legal entity for the base period.

#### **§ 1400.502 Compliance and enforcement.**

(a) To comply with the average adjusted gross income limitation, a person or legal entity, including all interest holders in a legal entity, general partnership, or joint venture, must provide annually the following as required by CCC:

(1) A certification in the manner prescribed by CCC from a certified public accountant or attorney that the average adjusted gross income of the person or legal entity does not exceed the applicable limitation;

(2) A certification from the person or legal entity that the average adjusted gross income of the person or legal entity does not exceed the applicable adjusted gross income limitations;

(3) The relevant Internal Revenue Service documents and supporting financial data as requested by CCC. Supporting financial data may include

State income tax returns, financial statements, balance sheets, reports prepared for or provided to another Government agency, information prepared for a private lender, and other credible information relating to the amount and source of the person's or legal entity's income; or

(4) Authorization for CCC to obtain tax data from the Internal Revenue Service for purposes of verification of compliance with this subpart.

(b)(1) All persons and legal entities are subject to an audit by FSA of any information submitted in accordance with this subpart. As a part of this audit, income tax returns may be requested, and if requested, must be supplied by all related persons and legal entities.

(2) In addition to any other requirement under any Federal statute, relevant Federal income tax returns and documentation must be retained a minimum of two years after the end of the calendar year corresponding to the year for which payments or benefits are requested.

(c) Failure to provide necessary and accurate information to verify compliance, or failure to comply with this subpart's requirements, will result in ineligibility for all program benefits subject to this subpart for the year or years subject to the request.

#### **§ 1400.503 Commensurate reduction.**

(a) Any program payment or benefit subject to this subpart provided to a legal entity, general partnership, or joint venture will be reduced by an amount commensurate with the direct and indirect ownership interest in the legal entity, general partnership, or joint venture of each person or legal entity determined to have an average adjusted gross income in excess of the applicable limitation under the standards provided elsewhere in this subpart for the direct recipient of such payments.

(b) Ownership interest in a legal entity will be reviewed to the fourth level of ownership, as specified in § 1400.105, to determine whether a commensurate reduction is applicable and the extent of such reduction. If an ownership interest is not held by a person in the fourth level of ownership in a legal entity, no payment or benefit will be made with respect to such interest.

Signed in Washington, DC, on December 19, 2008.

**Glen L. Keppy,**

*Acting Executive Vice President, Commodity Credit Corporation.*

[FR Doc. E8-30764 Filed 12-23-08; 11:15 am]

**BILLING CODE 3410-05-P**

## **DEPARTMENT OF AGRICULTURE**

### **Commodity Credit Corporation**

#### **7 CFR Part 1412**

**RIN 0560-AH84**

#### **Direct and Counter-Cyclical Program and Average Crop Revenue Election Program**

**AGENCY:** Commodity Credit Corporation, Agriculture.

**ACTION:** Final rule.

**SUMMARY:** This rule implements the provisions of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) regarding the direct and counter-cyclical payment program (DCP) for the 2008 through 2012 crop years as well as Average Crop Revenue Election (ACRE) program payments for the 2009 through 2012 crop years. The 2008 Farm Bill further authorizes payments, with some changes, that were previously authorized under the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill) regarding direct and counter-cyclical payments for the crop years 2002 through 2007. The payments provide income support to producers of eligible commodities and are based on historically-based acreage and yields and do not depend on the current production choices of the farmer. In general, the 2008 Farm Bill provides payments to eligible producers of covered commodities and peanuts and beginning in 2009, pulse crops as well. Additionally, the 2008 Farm Bill provides for the establishment of a yield for each farm for any designated oilseed or eligible pulse crop for which a payment yield was not established under the 2002 Farm Bill.

**DATES:** *Effective Date:* December 23, 2008.

#### **FOR FURTHER INFORMATION CONTACT:**

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Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

#### **SUPPLEMENTARY INFORMATION:**

#### **Direct and Counter-Cyclical Program and Average Crop Revenue Election Program**

For crop years 2002 through 2007, pursuant to the 2002 Farm Bill (Pub. L.