



April 6, 2009

Dan McGlynn, Acting Director  
Production, Emergencies and Compliance Division  
USDA/FSA  
Stop 0517, Room 4754  
1400 Independence Avenue SW  
Washington D.C. 202.50-0517

Submitted via [Dan.McGlynn@wdc.usda.gov](mailto:Dan.McGlynn@wdc.usda.gov), [www.regulations.gov](http://www.regulations.gov), and Courier

**RE: Interim Final Rule for Farm Program Payment Limitation and Payment Eligibility for 2009 and Subsequent Crop, Program, or Fiscal Years, 73 Fed. Reg. 79267-79284 (Dec. 29, 2009).**

Dear Mr. McGlynn:

This letter constitutes the comments of the National Sustainable Agriculture Coalition (NSAC) on the Interim Final Rule for Commodity Program Payment Limitations and Payment Eligibility. NSAC represents farm, food, rural, and conservation organizations from all regions of the country that share a commitment to federal policy that promotes sustainable agriculture production systems, family-based farms and ranches, and healthy, vibrant rural communities. A complete list of our represented members is appended to these comments.

NSAC believes that farm program payments should be designed in a manner consistent with U.S. policy, established by Congress, to foster family farm agriculture. To achieve that end, it is critical that all payments be capped at levels that do not encourage and subsidize farm consolidation and concentrated landholding. Payments should also be targeted to working farmers, not non-farm investors. To the maximum extent possible, programs should encourage, not discourage, new, beginning and young farmers to get into the business. In order to promote farming opportunity and to provide for a reasonable safety net, limitations and eligibility standards should be strict enough to reduce the capitalization of payments into land values. In addition, NSAC also believes that farm program payment policy should in the near term at least be consistent with strong conservation and environmental stewardship, and in the longer term should be geared to advancing agro-environmental goals. Such policies would help promote economic profitability and opportunity and in turn help support healthier and more prosperous rural farming communities and a better rural environment.

Sadly, such a policy does not currently exist. Some partial semblance of such a policy is available, though, through payment limitations and eligibility rules and through conservation compliance rules. These are important provisions, and could help point commodity policy in the right direction. Both of those provisions, however, are laden with loopholes and suffer from extremely weak enforcement, rendering them far less relevant in the real world than all the

attention given to them in policy debates and all the pages given to them in statute might otherwise suggest.

These weaknesses are not an accident, but rather the well-reimbursed work of an entire industry that has emerged to help a minority of farmers and landowners evade the law, rip-off the taxpayer, harm the environment, weaken the family farm system of agriculture, and mock any notion of good government. In short, current policy is broken and in desperate need of repair.

With this rulemaking, the Department has a unique opportunity to fix some of the major problems that plague payment limit law. While some payment limit loopholes are statutory, and hence can only be fixed by Congress, others are loopholes put into place by USDA over the years via regulation. This rulemaking marks an historic opportunity to reverse course on the latter and close down much of the abusive payment limitation evasion industry.

Importantly, the Department was invited to close the loopholes and toughen enforcement by the Managers of the 2008 Farm Bill, who wrote specific language in the Conference Report directing the Department to rewrite its regulations pertaining to actively engaged in farming rules and schemes and devices (Report 110-627, page 695).

Given this directive along with the need to rewrite other sections of payment limit regulations to conform to new statutory provisions included in the 2008 Farm Bill, we waited anxiously for what was to become the December 29, 2008 rulemaking. We were optimistic that the new rule would, among other improvements, close the biggest payment limit loophole of them all – the lack of a quantifiable and enforceable management test within the actively engaged in farming rules. This hope was dashed.

While the new interim rule does some small and supportable adjustments to the actively engaged rules, it does not close the major loophole and thus would continue to invite mega farms to circumvent payment limitations by claiming investors, employees, relatives, and others with at best marginal roles in the management of the operation as qualified for farm program payments. This is the biggest and easiest doorway to unlimited payments and continuation of this loophole is in fact the continuation of current regulatory policy: USDA-sanctioned unlimited payments to farms no matter how large and payments no matter how big.

The management loophole to the actively engaged in farming rules were written into regulation by USDA over twenty years ago, in contradiction to the intent of Congress in passing payment limitation reform. Through multiple farm bill iterations ever since, the law has continued to require a substantial contribution of active personal labor or active personal management in order to qualify for payments. USDA has nonetheless persisted with the weak and ineffective management test that has effectively nullified payment limitations law.

This extreme weakness in current regulations was highlighted by USDA's Payment Limitation Commission in its *2003 Report of the USDA Commission on the Application of Payment Limitations for Agriculture* and by the Government Accountability Office in their report entitled *Farm Program Payments: USDA Should Correct Weaknesses in Regulations and Oversight to Better Ensure Recipients Do Not Circumvent Payment Limitations*. The loophole has also drawn

repeated attention by the Office of the Inspector General. These reports recommend strengthening of the management test and stricter enforcement and oversight to ensure that individuals who receive farm payments are actually actively engaged in farming and that schemes and devices widely used to evade payment limitations are shut down.

Both the USDA Commission and the GAO recommended development of measurable standards to define significant contribution of active personal management. In 2004 the GAO recommended that the Secretary of Agriculture direct the Administrator of the Farm Service Agency to develop and promulgate these standards, but USDA declined to follow the GAO's advice. With publication of the new interim rule on December 29, 2008, USDA is once again disregarding the GAO recommendation.

Instead of a measurable standard, the interim rule adds new subjective criteria to the existing highly subjective and nebulous management test. The interim rule attempts to rein in abuse by requiring that management participation be regular and independent from the contributions of other partners. We do not oppose the micro-changes to the law, but we believe they will be almost as ineffective as previous rules, requiring only tiny and relatively easy changes to the current schemes used to evade payment limits.

This is not the time to nibble around the edges of reform to a system that is broken. Instead, this is the time for real and effective change. If all the new rules do is make it just a bit harder for mega farms to collect multiple payments, the battle will have been lost. The only winners will be the lawyers and accountants who can charge mega farms a few extra dollars for their services arranging minor procedural changes to ensure compliance with weak regulations.

The bottom line is the interim final rule does not stop mega farms from collecting unlimited payments by taking on passive partners in schemes designed to evade the law and deplete the public treasury. As we specify in detailed comments below, the only way to put an end to this chicanery is to adopt by rule a reasonable and quantifiable standard requiring actual participation in the day to day management of the farm.

This is a defining moment for the Obama Administration – adding a measurable standard and then enforcing it will follow through on a strong, clear campaign promise. It will also provide for quick and immediate action to back up the positive direction laid down in the White House FY 2010 budget framework that calls for a hard cap on payments.

We offer the following detailed recommendations in the hope they will form the substance of the new commitment to reform. Where detailed language is provided, underscores represent proposed new language and strikethroughs represent proposed deletions.

### **NSAC Recommendations on Regulatory Definitions (Section 1400.3)**

**1. Active Personal Management** -- The interim rule makes no changes to the existing regulatory definition of “active personal management.” We recommend three changes be made to the definition in the final rule.

First, in the opening clause, we recommend the following addition:

“Active personal management means personally, and on a regular, substantial, and continuing basis, providing and participating in:”

This addition will clarify and strengthen the meaning and understanding of the long list of specific types of activities that follow. In addition, it would actually reduce the need to add one or more of those words throughout the rest of the rule, as it would be part of the definition to begin with, thus making for a tidier rule. Finally, it would ensure that the IRS rule for passive investors in agricultural operations would match the FSA definition, which in turn will aid in implementation and enforcement efforts.

Second, in the first enumerated item, we recommend the following addition:

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

This proposed change adds relevant clarity that the management function is not occasional or sporadic, but rather is regular and consistent.

Third, in the second enumerated item, we recommend the following deletion and addition:

“(2) Services (~~whether performed on-site or off-site~~ including but not limited to significant on-site services) reasonably related and necessary to the farming operation, including:”

There are some management services which can be rendered from afar and those that need to be provided for at the farm. It is not unreasonable to require that any person eligible to receive taxpayer-provided benefits under the farm programs as “actively engaged in farming” to actually be on the farm in some management capacity for at least some significant amount of the time. The alternative, “supervision” of farming activities from several states away via infrequent conference call with the real manager as documented in the GAO report, invites blatant abuse of the program.

**2. Attribution** -- This is a very minor matter, but attribution is not “the combination of any payment...” but rather “the act of combining any payment...” Attribution is the act of attributing, not the result of attributing.

**3. Capital** – The interim rule makes several changes to the old rule’s definition of capital. It requires funding provided to a farming operation to be independent and separate from funding provided to all other farming operations and it requires that a person or entity’s contribution of capital to be independent from that of others. It also clarifies that advance program payments are not considered capital contributions, eliminating a previous abusive practice. We support all of these changes and recommend they be retained in the final rule.

**4. Contribution** – The interim rule adds a new definition of the term “contribution” that clarifies that contributions of land, capital or equipment and contributions of labor or management must be in exchange for or in expectation of deriving benefit based solely on the success of the farming operation. We support this addition and recommend it be retained in the final rule.

**5. Joint operation** – The interim rule adds to the previous definition of joint operation by specifying that members of joint operations are jointly and severally liable for obligations of the organization. This is consistent with a change made in the 2008 Farm Bill and may help in payment limitation enforcement efforts. We support the addition and its retention in the final rule.

**6. Payment** – We note in passing that the interim rule eliminates marketing loan gains and loan deficiency payments from the list of payments which are subject to limitations, consistent with that anti-reform element contained in the 2008 Farm Bill. While that rule change is consistent with the statutory change, we do note that it opens the farm program payment system to unlimited payments in low commodity price years, making it a huge new loophole in the law. This regulatory change, necessitated by the statutory change, is of course totally inconsistent with the President’s proposal to enact a \$250,000 hard cap on total payments. We look forward to working with the Administration to remove this enormous payment limitation loophole.

**7. Significant contribution** – **This is the key section that needs to be revised in developing the final rule. The interim rule retains the current, largely ineffective active personal management test. This definition is the make or break point for the effectiveness of the entire actively engaged in farming rule revision and will determine more than any other change whether or not the final rule will be effective and enforceable or will continue down the road of the last 20-plus years of having an ineffective rule that allows and indeed invites mega payments to mega farms.**

We recommend the following changes:

“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 For~~ 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~~ 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; 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~~ 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."

**The adoption of these recommended changes would at long last provide a consistent, fair, measurable, and enforceable standard for active farm management. We strongly urge their adoption in the final rule.**

#### **NSAC Recommendations on Changes in Farming Operations (Section 1400.104)**

**1. 1400.104(a)(3)** – We support, with a proposed modification, the change made in the interim rule to generally limit to one additional person eligible for payments if the size of a farming operation's base acres increases by at least 20 percent, unless the FSA State Office determines that the increase in the size of the operation supports additional persons. The addition of the 'one additional person' default setting is helpful and should be retained in the final rule. However, we believe the exception clause related to the State Office needs further clarification. We suggest the following clarifying language:

“(3)(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 based solely on the expectation to benefit from the commercial success of the farming operation.”

In our view, the complexity of a farming operation's legal structure or production system should not play a role in making determinations about whether a substantive change is bone fide or whether it is sufficient to allow for the addition of more than one program payment participant. However, it is very important that the additional persons directly benefit from the commercial, marketplace success of the operation according to their share of the operation. Having such a standard in the rule is important. Otherwise the exception clause language in the interim rule could be read to allow additional payees for purpose of maximizing government payments.

**2. 1400.104(a)(4) and (5)** – We strongly support, with one modification, the changes made in these two subparagraphs to ensure that equipment sales and gifts and land sales and gifts are not used as subterfuge mechanisms to dodge payment limit rules. The manipulation of sale and lease terms has often been used by mega farms to hide payment limitation abuse and therefore clear new rules are necessary to prevent continued abuse. Requiring commensurate share and fair market value and prohibiting previous owner-financing and effective control are important reforms, and we support their inclusion in the final rule.

To further strengthen and clarify the rule, we propose the following additions:

“(4)(iii) The former owner of the equipment has no direct or indirect control over such equipment.”

“(5)(iii) The former owner of the land of the land has no direct or indirect control over such land.”

### **NSAC Recommendations on Payment Eligibility (Subchapter C)**

**1. General Actively Engaged in Farming Rules (Sec. 1400.201)** -- We support all of the changes made in the interim rule with respect to Section 1400.201 and recommend their inclusion in the final rule. These include the addition of “and separately” in (b)(1), the addition of specifying that level of risk must be commensurate share of the farming operation in (b)(3), the new subsection (c) specifying that contributions of capital, equipment, or land must be separate and distinct interests and that all funds and business accounts must be separate from those of other persons or entities, and the addition of the new (d)(4) pertaining to compensation for labor and management.

**2. Persons (Sec. 1400.202)** – We support the addition of “independently and separately” in (a)(1) as well as the adoption of the new (a)(3) specifying that contributions to a farming operation must be at risk and the level of risk must be commensurate with the person or entity's share in the farming operation.

With respect to the new subsection (b) pertaining to the new spouse rule for actively engaged, we note that the change is consistent with the statutory provision in the 2008 Farm Bill. However, since this 2008 Farm Bill provision allows virtually all farming operations, other than farms operated by single, unmarried persons, to receive twice the statutory payment limitations, we note for the record that effective payment limitation provisions to achieve the President's proposed \$250,000 hard cap on payments will necessitate revisiting and changing this portion of

the 2008 Farm Bill. We strongly support the adoption of the Dorgan-Grassley proposal with respect to this issue and urge USDA to back the provisions of Dorgan-Grassley that would help fulfill the President's budget proposal for a hard cap.

**3. Joint operations (Sec. 1400.203)** – We support the changes made as part of the interim rule in (a)(1) to require that active personal labor or management be performed on a regular basis, be identifiable and documentable, and be separate and distinct from other members' contributions. We emphasize, however, that these additions would be bolstered by the addition of “regular, substantial, and continuous” in the definition section for the definition of active personal management (see the very first recommendation above).

We also support the addition of commensurate share and at risk criteria in (a)(2) and (3), and urge these be retained in the final rule.

Subsection (c), however, needs an important new addition to deal with situations in which a single person or entity provides the labor or management necessary for multiple operations to receive separate payments. To prevent this avenue of abuse the final rule should incorporate an “except clause” in subsection (c) as part of the final rule:

“(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 Sec. 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, except that no one person can provide the active personal labor, active personal management, or a combination of active personal labor and active personal management for multiple farming operations collectively receiving more than the applicable payment limitations for a person or legal entity.”

We strongly urge that this additional abuse prevention provision be added to the final rule.

**4. Limited partnerships, limited liability partnerships, limited liability companies, corporations, and other similar legal entities (Sec. 1400.204)** – We support the addition of “independently and separately” in (a)(1), but we strongly object to the deletion of the 50 percent rule in (a)(2). The interim rule's proposed abolition of the old rule that active personal labor or active personal management must be provided by shareholders accounting for at least 50 percent of the ownership interest in the entity will have the effect of reducing payments to small and mid-sized family farm corporations who have incorporated for estate planning purposes. This unfairly penalizes quite reasonable estate planning activities and will cut many smaller farms' otherwise due payments in half.

It is particularly ironic that an interim rule which does little to prevent mega farms from collecting unlimited payments would, at the same time, propose to reduce payments to smaller operations. We stress that this change was not required by any change in the statute. The statute



continues to require that the stockholders “collectively” make a significant contribution of labor or management. That standard is met by the 50 percent rule.

We urge the Department to look at all possible 2009 crop year remedies to the interim rule’s perhaps unintended consequence of reducing payments for smaller operations already below the statutory payment limits. Our hope is there is still time and mechanisms available to prevent reductions in payments to operations which are well under the limitations and will otherwise have their payments substantially cut due to reasonable estate planning structures.

In the final rule for all future crop years, we strongly urge the reinstatement of the old rule, modified only by changing 50 percent to 51 percent.

Most payment limitation abuse occurs through general partnerships. General partnerships are not subject to the payment limitations. Corporations, by contrast, are subject to the limits at the corporate level. As a result, there is far less abuse on the corporate side. Since all corporations are limited to one payment limitation, it is not necessary to require active participation by each shareholder.

However, the same rule should apply to corporations as we propose above for joint operations in 400.203(c), namely that no person may provide the active labor and management for corporations that collectively receive more than the applicable payment limitation amount. With this addition, mega farms would not be allowed to divide the farm into two corporations eligible for separate payment limitation amounts despite having the same principal operator.

Hence, we recommend the following changes:

“(a)(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 farm operation, such that the combined beneficial interest of all the partners, stockholders, or members providing active personal labor or active personal management, or a combination of active personal labor and active personal management must be at least 51 percent. The active personal labor or active personal management, or combination of active personal labor and active personal management of the at least 51 percent partners, stockholders, or members must be:

~~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.
- (6) No person can provide the active personal labor, active personal management, or a combination of active personal labor and active personal management for multiple limited partnerships, limited liability partnerships, limited liability companies, corporations, and other similar legal entities collectively receiving more than the applicable payment limitations for a person or legal entity

**5. Trusts and Estates** – We support the new language in 1400.205 and 1400.206 requiring that trusts and estates, to be considered actively engaged, must have a commensurate share of the farming profits or losses and must be at risk, with the level of risk being commensurate with the claimed share of the farming operation. We also support the new requirement that estates provide a tax identification number for the estate and legal documents that identify heirs and tax identification numbers for heirs.

**6. Share Rent Landowners** – We support the new language in 1400.207 requiring that share rent landlords, to be considered actively engaged, must have a share of the profits or losses from the farming operation commensurate with their contribution to the operation and must be at risk, with the level at risk being commensurate with their share of the farming operation. We strongly urge the addition, however, of a new (a)(4) to read as follows:

“(a)(4) rents the land at a rate that is usual and customary.”

The use of cut-rate leases has been a means used to evade payment limitations. Moreover, as actively engaged rules are tightened up, if this avenue of evasion is left open, more operations affected by the limitations will flock to this tool. Specifying usual and customary rents will reduce evasion and aid enforcement in such cases.

**7. Family Members and Sharecroppers** – We support the new language in 1400.208 and 1400.209 requiring that adult family members and sharecroppers, to be considered actively engaged, must have a share of the profits or losses from the farming operation commensurate with their contribution to the operation and must be at risk, with the level at risk being commensurate with their share of the farming operation.

Thank you for considering our views and recommendations.

Sincerely,

*Ferd Hoefner*

Ferd Hoefner  
Policy Director  
National Sustainable Agriculture Coalition

**NATIONAL SUSTAINABLE AGRICULTURE COALITION**  
**Represented Member Organizations**

Agriculture and Land-Based Training Association (ALBA) - *Salinas, CA*  
Alternative Energy Resources Organization (AERO) - *Helena, MT*  
California Certified Organic Farmers (CCOF) - *Santa Cruz, CA*  
California FarmLink - *Sebastopol, CA*  
CASA del Llano (Communities Assuring a Sustainable Agriculture) - *Hereford, TX*  
Center for Rural Affairs - *Lyons, NE*  
Community Alliance with Family Farmers - *Davis, CA*  
Dakota Rural Action - *Brookings, SD*  
Delta Land and Community, Inc. - *Almyra, AR*  
Ecological Farming Association - *Watsonville, CA*  
Flats Mentor Farm - *Lancaster, MA*  
Florida Organic Growers – *Gainesville, FL*  
Food Animal Concerns Trust – *Chicago, IL*  
Georgia Organics - *Atlanta, GA*  
Grassworks - *Wausau, WI*  
Illinois Stewardship Alliance - *Rochester, IL*  
Institute for Agriculture & Trade Policy - *Minneapolis, MN*  
Iowa Environmental Council - *Des Moines, IA*  
Iowa Natural Heritage Foundation - *Des Moines, IA*  
Izaak Walton League - *St. Paul, MN*  
Just Food - *New York, NY*  
Kansas Rural Center - *Whiting, KS*  
Kerr Center for Sustainable Agriculture - *Poteau, OK*  
Land Stewardship Project - *White Bear Lake, MN*  
Land for Good - *Belchertown, MA*  
Michael Fields Agricultural Institute - *East Troy, WI*  
Michigan Integrated Food and Farming Systems - *East Lansing, MI*  
Midwest Organic & Sustainable Education Service - *Spring Valley, WI*  
National Catholic Rural Life Conference - *Des Moines, IA*  
National Center for Appropriate Technology - *Butte, MT; Fayetteville, AR; Davis, CA*  
New Mexico Acequia Association - *Santa Fe, NM*  
Northeast Organic Dairy Producers Alliance (NODPA) - *Deerfield, MA*  
Northern Plains Sustainable Agriculture Society - *Fullerton, ND*  
Ohio Ecological Food & Farm Association - *Columbus, OH*  
Organic Farming Research Foundation - *Santa Cruz, CA*  
Rural Advancement Foundation International, USA - *Pittsboro, NC*  
Sierra Club Agriculture Committee - *Nationwide*  
Union of Concerned Scientists (Food and Environment Program) - *Cambridge, MA/Wash DC*  
Virginia Association for Biological Farming - *Lexington, VA*  
Washington Sustainable Food and Farming Network - *Mount Vernon, WA*  
Wild Farm Alliance - *Watsonville, CA*