



May 26, 2015

James Baxa
Production, Emergencies, and Compliance Division
Farm Service Agency
US Department of Agriculture
1400 Independence Ave. SW
Washington, DC, 20250-0501

Re: NSAC Comments on Payment Limitation and Payment Eligibility; Actively Engaged in Farming -- RIN 0560-AI31

Dear Mr. Baxa:

The National Sustainable Agriculture Coalition (NSAC) welcomes the opportunity to submit comments on the Commodity Credit Corporations proposed actively engaged in farming rule. NSAC is a national alliance of 41 family farm, food, rural, and conservation organizations¹ that together take common positions on federal agriculture and food policies to advance sustainable agriculture.

A core tenant of this country's farm safety net has been to target price and income support to family-scale farming operations, not to passive investors and no unlimited support to mega-farms. Yet, ever since promulgating rules to implement the actively engaged in farming requirement of the Omnibus Budget Reconciliation Act of 1987, USDA has consistently failed to enact a rule that meets this standard. Instead, USDA has opted to codify, via regulation, massive loopholes that so substantially weaken the actively engaged in farming requirement as to make the underlying statutory payment limitation largely ineffective. For the past 27 years and counting, the result has been the artificial construction of a USDA-created comparative advantage for mega farms, reducing risk and creating rewards for relentless consolidation and expansion that has imperiled family farms and especially young and beginning farmers.

¹ Agriculture and Land Based Training Association, Alternative Energy Resources Organization, California Certified Organic Farmers, California FarmLink, C.A.S.A. del Llano (Communities Assuring a Sustainable Agriculture), Catholic Rural Life, Center for Rural Affairs, Clagett Farm/Chesapeake Bay Foundation, Community Alliance with Family Farmers, Dakota Rural Action, Delta Land and Community, Ecological Farming Association, Farmer-Veteran Coalition, Flats Mentor Farm, Florida Organic Growers, Grassworks, Hmong National Development, Illinois Stewardship Alliance, Institute for Agriculture and Trade Policy, Interfaith Sustainable Food Collaborative, Iowa Natural Heritage Foundation, Izaak Walton League of America, Kansas Rural Center, Kerr Center for Sustainable Agriculture, Land Stewardship Project, Michael Fields Agricultural Institute, Michigan Integrated Farm and Food Systems, Michigan Organic Food and Farm Alliance, Midwest Organic and Sustainable Education Service, National Center for Appropriate Technology, Nebraska Sustainable Agriculture Society, Northeast Organic Dairy Producers Alliance, Northern Plains Sustainable Agriculture Society, Northwest Center for Alternatives to Pesticides, Ohio Ecological Food and Farm Association, Oregon Tilth, Organic Farming Research Foundation, Rural Advancement Foundation International – USA, Union of Concerned Scientists Food and Environment Program, Virginia Association for Biological Farming, Wild Farm Alliance.

Sadly, in this proposed rule USDA has again failed to seize the opportunity to enact rules that will truly target the safety net as Congress intended. We appreciate that the proposed rule strengthens the definition of significant contribution of active personal management and provides a quantifiable test for active personal management – both steps in the right direction. Yet, the proposed rule so limits the application of these reforms as to make them nearly meaningless.

In fact, for the first time ever, the proposed rule would officially sanction the right of mega farms to legitimately receive federal payments in excess of \$1 million a year, in complete contradiction to the purpose, letter, and spirit of the law. This is a shocking and profound step backward, weakening even the existing loophole-ridden regulations. The small steps forward toward reform in the proposed rule hence must ultimately be seen as little better than window dressing for what in reality would be the most substantial backpedaling away from payment limits in the history of USDA rulemaking over the past generation since the actively engaged in farming limitation was placed in statute.

It is deeply ironic that such a proposed rule would be issued during the Obama Administration. In his rural issue campaign platform entitled *Real Leadership for Rural America*, the then candidate now President had this to say – on the very first page of a 13-page platform - about the long-standing loopholes in the actively engaged in farming rules:

Strong Safety Net for Family Farmers: Barack Obama and Joe Biden will fight for farm programs that provide family farmers with the stability and predictability they need. They will ensure that American farmers are protected from market disruptions and weather disasters. And they will ensure farm programs are strong and are targeted to support family farmers.

The lack of effective payment limitations has resulted in federal farm programs financing farm consolidation and the elimination of many mid-size family farms. Barack Obama and Joe Biden believe we should implement a \$250,000 payment limitation. And they will ensure those payments go to farmers who need them – not millionaire farmers who rely on American taxpayers to protect their multi-million dollar profits.

Most importantly, Barack Obama and Joe Biden will close the loopholes that allow mega farms to get around the limits by subdividing their operations into multiple paper corporations. They will take immediate action to close the loophole by proposing regulations to limit payments to active farmers who work the land, plus landlords who rent to active farmers. Both the Government Accountability Office and the Payment Limitation Commission have called for closing this loophole. **Every president since Ronald Reagan has had the authority to close this loophole without additional action by Congress, but has failed to act.** (*emphasis added*)

It is indeed true that every president, and every Secretary of Agriculture, has had the authority to close the loopholes without additional action by Congress but has failed to act. This rulemaking is the last opportunity for this Administration to turn the tide and get it right. In that light, NSAC and our represented member organizations urge you to adopt the following recommendations to strengthen the proposed rule to finally make payment limits fair and effective.

We thank you for your serious consideration of our recommendations, and would welcome the opportunity to respond to questions you may have or offer any additional feedback you may need.

Sincerely,



Ferd Hoefner, Policy Director
National Sustainable Agriculture Coalition



Paul Wolfe, Policy Specialist
National Sustainable Agriculture Coalition

cc:

Secretary of Agriculture Tom Vilsack
Deputy Secretary Krysta Harden
Under Secretary Michael Scuse
Administrator Val Dolcini
Deputy Administrator Mike Schmidt

NSAC RECOMMENDATIONS

Organized as Responses to the Questions on which FSA Requested Comment

1. **Is the proposed rule change for the number of managers appropriate and is the definition of large and complex farming operations reasonable?**
 - a. **No, nothing in the rule should qualify a farm for more than one payment limit (plus the spouse payment limit²).**

The farm safety net in this country was never supposed to be about trying to maximize government payments or about covering every bushel of every commodity on every acre. It is intended to provide modest support to working farmers to protect against low prices or yields and to provide enough support that if a farmer has a bad year they can survive to plant again the next year.

While American agriculture is diverse, there is no reason that one type of farm should be entitled to more payments than another type based purely on their need for more managers. The largest most complex farms are the least in need of government payments, but this proposed rule implies that they have a need and indeed a right to more government assistance. Just because a farm is bigger than others or is more complex does not mean they deserve additional payment limits.

Decisions about the appropriate number of management-only participants in a farming operation should have no connection to the amount of federal support a farming operation can receive. These decisions should be private business decisions, based on the needs of the farming operation, not decisions based on how much money an operation can extract from taxpayers.

There is, moreover, no statutory basis for creating additional payment limits for a farm that is either large or complex. These categories do not appear in statute and have no rightful place in the rule.

The agency is proposing two payment limits for each operator and spouse combination, plus a payment limit for a person plus spouse supplying only management (but without a quantifiable test for such management), plus a payment limit for a person plus spouse supplying only management (this time with a quantifiable test) for a farm over 2,500 acres, plus a payment limit for a person plus spouse supplying only management (again with a quantifiable test) and spouse. In this manner, the agency creates out of whole cloth a \$1,000,000 or greater payment limit for a single farm in a single year.

The fact that agency is proposing that the statutory \$125,000 payment limit could and should be manipulated via the rules into a \$1,000,000 or greater payment limit is profoundly offensive to advocates for family farms and for taxpayers. Over the years, the Government Accountability Office, the Payment Limit Commission, and USDA's Inspector General have criticized the way USDA handles the payment limits issue, and rightly so. USDA should address these concerns by limiting the number of payment limits per farm to one (plus the additional spouse limit). Including

² NSAC does not support the current statutory spouse rule. In our view, all persons on a farm should be required to be actively engaged in farming to receive payments, and discrimination against farms and farmers based on marital status is just that, discrimination. However, we recognize it is the law of the land and that FSA must double the payment limitation for farms with married couples, however little sense that makes as a matter of public policy.

the spouse payment, that is a quarter of a million dollars a year. There is no excuse whatsoever for FSA to provide additional payment limits to any farm, regardless of size, complexity, number of investors, marital status, or any other factor.

We urge you therefore to make the following changes to the rule:

§ 1400.3 Definitions

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 does not substantially share equipment, labor, or management with another operation and 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.

§ 1400.602 Restrictions on active personal management contributions.

(a) If a farming operation includes any nonfamily members as specified under the provisions of § 1400.201(b)(2) and (3) ~~and the farming operation is seeking to qualify more than one person as providing a significant contribution of active personal management then:~~

(1) Each such person must maintain contemporaneous records or logs as specified in § 1400.603;

(2) The qualification of more than one person as providing a significant contribution of active personal management shall not qualify the operation for any payment beyond the amounts specified in § 1400.1(f);

~~(2) Subject to paragraph (b) of this section, if the farming operation seeks not more than one additional person to qualify as providing a significant contribution of active personal management because the operation is large, then the operation may qualify for one such additional person if the farming operation:~~

~~(i) Produces and markets crops on 2,500 acres or more of cropland; or~~

~~(ii) For farming operations that produce honey with more than 10,000 hives; or~~

~~(iii) For farming operations that produce wool with more than 3,500 ewes; and~~

~~(3) If the farming operation seeks not more than one additional person to qualify as providing a significant contribution of active personal management because the operation is complex, then the operation may qualify for one such additional person if the farming operation is determined by the FSA state committee as complex after considering the factors described in paragraphs (a)(3)(i) and (ii) of this section. Any determination that a farming operation is complex by an FSA state committee must be reviewed and the determination must be concurred by DAFP to be applied. To demonstrate complexity, the farming operation will be required to provide information to the FSA state committee on the following:~~

~~(i) Number and type of livestock, crops, or other agricultural products produced and marketing channels used; and~~

~~(ii) Geographical area covered.~~

~~(b) FSA state committees may adjust the limitations described in paragraph (a)(2) of this section up or down by not more than 15 percent if the FSA state committee determines that the relative size of farming operations in the state requires a modification of either or both of these limitations. If the FSA state committee seeks to make a larger adjustment, then DAFP will review and may approve such request.~~

~~(c) If a farming operation seeks to qualify a total of three persons as providing a significant contribution of active personal management, then the farming operation must demonstrate both size and complexity as specified in paragraph (a) of this section.~~

~~(d) In no case may more than three persons in the same farming operation qualify as providing a significant contribution of active personal management, as defined by this subpart.~~

~~(e) (3) A person's contribution of active personal management to a farming operation specified in § 1400.601(b) will only qualify one member of that farming operation as actively engaged in farming as defined in this part. Other individual persons in the same farming operation are not precluded from making management contributions, except that such contributions will not be recognized to meet the requirements of being a significant contribution of active personal management; and~~

~~(4) A person's contribution of active personal management to a farming operation specified in § 1400.601(b) will not qualify more than one farming operation as actively engaged in farming as defined in this part.~~

b. We strongly oppose retention of the large and complex provisions in the proposed rule and urge their elimination; should they be retained in the final rule, however, they should be strengthened to prevent the creation of a permissive definition that would invite abuse.

Allowing FSA State Committees to make decisions about whether a farm is complex or not is a recipe for abuse and will almost certainly lead to a permissive environment and different standards being developed in different states. Decisions about compliance with payment limits should be the job of federal employees empowered to enforce the law. State Committees should not have any discretion to modify the definition of a large farm; this would open up another avenue for abuse.

Should you retain these provisions at all, and we hope you do not, we would then urge you to adopt the following changes to the proposed rule:

§ 1400.602 Restrictions on active personal management contributions.

(a) If a farming operation includes any nonfamily members as specified under the provisions of § 1400.201(b)(2) and (3) and the farming operation is seeking to qualify more than one person as providing a significant contribution of active personal management then:

(1) Each such person must maintain contemporaneous records or logs as specified in § 1400.603; and

(2) Subject to paragraph (b) of this section, if the farming operation seeks not more than one additional person to qualify as providing a significant contribution of active personal management because the operation is large, then the operation may qualify for one such additional person if the farming operation:

(i) Produces and markets crops on 2,500 acres or more of cropland; or

(ii) For farming operations that produce honey with more than 10,000 hives; or

(iii) For farming operations that produce wool with more than 3,500 ewes; and

(3) If the farming operation seeks not more than one additional person to qualify as providing a significant contribution of active personal management because the operation is complex, then the operation may qualify for one such additional person if the farming operation is determined by appropriate state or federal level FSA employees ~~state committee~~ as complex after considering the factors described in paragraphs (a)(3)(i) and (ii) of this section. Any determination that a farming operation is complex by an FSA ~~state level employee state committee~~ must be reviewed and the determination must be concurred by DAFP to be applied. To demonstrate complexity, the farming operation will be required to provide information to ~~the FSA state committee~~ on the following:

(i) Number and type of livestock, crops, or other agricultural products produced and marketing channels used; and

(ii) Geographical area covered.

~~(b) FSA state committees may adjust the limitations described in paragraph (a)(2) of this section up or down by not more than 15 percent if the FSA state committee determines that the relative size of farming operations in the state requires a modification of either or both of these limitations. If the FSA state committee seeks to make a larger adjustment, then DAFP will review and may approve such request.~~

(c) If a farming operation seeks to qualify a total of three persons as providing a significant contribution of active personal management, then the farming operation must demonstrate both size and complexity as specified in paragraph (a) of this section.

(d) In no case may more than three persons in the same farming operation qualify as providing a significant contribution of active personal management, as defined by this subpart.

(e) A person's contribution of active personal management to a farming operation specified in § 1400.601(b) will only qualify one member of that farming operation as actively engaged in farming as defined in this part. Other individual persons in the same farming operation are not precluded from making management contributions, except that such contributions will not be recognized to meet the requirements of being a significant contribution of active personal management.

2. **Should farming entities owned by family members be subject to the same limits as other farming operations?**

- a. **The final rule should ensure fair and effective enforcement of the payment limitation by applying effective actively engaged in farming rules to all farming operations regardless of whether the farm is made up of family members, non-family members, or a combination of the two.**

The current actively engaged in farming rules include what is widely known to be a huge loophole centered in the non-quantifiable and not easily enforceable standard for so-called active personal management. Allowing the current actively engaged in farming rules to survive ensures that unlimited subsidies will continue unabated. The proposed rules leave the gaping loopholes in place, continuing the unfortunate FSA tradition of throwing up its hands and allowing lawyers and accountants to help mega-farms circumvent payment limits with relative ease.

By not applying fair and effective rules to all farms, the rule's impact will be severely limited. General partnerships and joint venture farms that include non-family members represent considerably less than four percent of participating farms. It is highly unlikely that under the new proposed rule any of the mega-farms among that four percent will have their subsidies limited. Instead, they will reorganize their farm business to eliminate non-family members, thus avoiding the new rules altogether. For those who choose not to reorganize, the proposed rule still provides a simple path for mega farms to secure a half million dollars a year and only a slightly harder path to secure over \$1 million dollars a year in federal support. The allowance for payments limited only by the size of one's extended family will make reorganization the preferred option for most mega farm entities, however.

FSA's own economic analysis indicates that the budget savings from this proposed rule will drop precipitously from 2016 through 2018 (from \$38 million to just \$4 million). This would seem to indicate that FSA expects most of the 1,400 operations potentially impacted to reorganize to avoid the constraints of the proposed rule. Not applying fair and effective rules to all farms, therefore, defeats the purpose of the proposed rule and is thus reflected in the score.

By allowing the old, loophole-ridden actively engaged rules to apply to the vast majority of farms, FSA is not fulfilling its obligation to fairly and effectively administer the law. This abdication of responsibility is, in a word, shameful.

The good news, however, is there is a simple two-part way out this sad state of affairs that would provide for fair and effective rules that also abide by the requirements of the 2014 Farm Bill. In the final rule, FSA should take the following two actions.

1. **Non-related entity farms** -- Apply a special actively engaged in farming rule, as required by the 2014 Farm Bill, to entities that include partners not related by blood or marriage. All such management-only participants in a farm entity should qualify for payments if they supply at least 500 hours of management activity a year or at least 50 percent of their commensurate share of total management activity for the farm. Management-only participants should not be allowed to count labor toward management. Spouses of management-only participants should qualify for payments only if they too meet the 500-hour or 50 percent of commensurate share test in their own right. Finally, all such managers of a farm, together with the operator or operators of the farm, should

receive no more than a single payment limit combined (plus the spouse payment for the principal operator).

NSAC appreciates the inclusion of the 500 hour test as part of the active personal management test in the proposed rule, but we believe it should be clearly stated that a person cannot use labor to help reach the 500 hour test included in the proposed rule.

The proposed requirement for a 25 percent share of total management should be raised to 50 percent of a person's commensurate share of the total hours necessary to operate a farm of comparative size in the final rule. Making this change would align this rule with the long-standing labor test provision dating back to 1987 that requires either 1,000 hours (half-time) or 50 percent of the person's commensurate hours share of the operation in labor.

We support the proposed rule's requirement that the significant contribution of active personal management can only count towards qualifying a person as actively engaged for one farming operation. We also support the inclusion of language that would prohibit separate operations from qualifying for separate payment limits if they substantially share equipment, labor, or management with another operation that when combined would exceed the payment limit. This is needed to prevent entities from abusing the rule by splitting up existing farms into separate entities in order to avoid the payment limit.

2. All other farms -- Amend the rules to require that, on all other farms but for those entities that include partners not related by blood or marriage, all persons who provide at least 1,000 hours of labor and management combined (in any combination) or at least 50 percent of their commensurate share of total labor and management requirements for the farm are eligible to receive payments but not a separate payment limits. However, the farming operation as a whole should be eligible for a single payment limit, plus a payment limit for the spouse of the principal operator regardless of whether that spouse is actively engaged in farming.

The Department has the authority, indeed the obligation, to fairly and effectively administer the law. That it is failed to do so since passage of the Omnibus Budget Reconciliation Act of 1987 in no way diminishes or dismisses that authority and obligation. While the 2014 Farm Bill requires two different regulatory requirements for the actively engaged in farming management test, it cannot remove FSA's long-standing legal obligations to fairly and effectively administer the law. Hence we believe a two-part solution is called for and essential to emerge from this rulemaking process with a fair and effective payment limit and enforcement regime.

In order to realize this two-part solution, we urge that the following changes be made to the proposed rule for entities that include partners not related by blood or marriage:

§ 1400.600 Applicability.

(a) This subpart is applicable to all of the programs as specified in § 1400.1 and any other programs as specified in individual program regulations.

(b) The requirements of this subpart will apply to farming operations for FSA program payment eligibility and limitation purposes as specified in subparts B and C of this part.

(c) The requirements of this subpart do not apply to farming operations specified in paragraph (b) of this section if ~~either:~~

~~(1) All all persons who are partners, stockholders, or persons with an ownership interest in the farming operation or of any entity that is a member of the farming operation are family members as defined in § 1400.3; or~~

~~(2) The farming operation is seeking to qualify only one person as making a significant contribution of active personal management for the purposes of qualifying only one person or entity as actively.~~

§ 1400.601 Definitions

Active personal management means personally providing and participating in management activities, but not labor, considered critical to the profitability of the farming operation and performed under one or more of the following categories:

(1) Capital, which includes:

- (i) Arranging financing and managing capital;
- (ii) Acquiring equipment;
- (iii) Acquiring land and negotiating leases;
- (iv) Managing insurance; and
- (v) Managing participation in USDA programs;

(2) Labor, which includes hiring and managing of hired labor but not personal labor; and

(3) Agronomics and marketing, which includes:

- (i) Selecting crops and making planting decisions;
- (ii) Acquiring and purchasing crop inputs;
- (iii) Managing crops (that is, whatever it takes to keep the growing crops living and healthy—soil fertility and fertilization, weed control, insect control, irrigation if applicable) and making harvest decisions; and
- (iv) Pricing and marketing of crop production.

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 does not substantially share equipment, labor, or management with another operation and 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.

Significant contribution of active person management means active person management activities performed by a person, with a direct or indirect ownership interest in the farming operation, on a regular, continuous, and substantial basis to the farming operation, and meets at least one of the following to be considered significant:

(1) Performs at least ~~25~~ 50 percent of the person's commensurate share of the total management hours required for the farming operation on an annual basis; or

(2) Performs at least 500 hours of management (not including labor) annually for the farming operation.

§ 1400.602 Restrictions on active personal management contributions.

(a) If a farming operation includes any nonfamily members as specified under the provisions of § 1400.201(b)(2) and (3) ~~and the farming operation is seeking to qualify more than one person as providing a significant contribution of active personal management~~ then:

(1) Each such person must maintain contemporaneous records or logs as specified in § 1400.603; and

(2) The qualification of more than one person as providing a significant contribution of active personal management shall not qualify the operation for any payment beyond the amounts specified in § 1400.1(f)

~~(2) Subject to paragraph (b) of this section, if the farming operation seeks not more than one additional person to qualify as providing a significant contribution of active personal management because the operation is large, then the operation may qualify for one such additional person if the farming operation:~~

~~(i) Produces and markets crops on 2,500 acres or more of cropland; or~~

~~(ii) For farming operations that produce honey with more than 10,000 hives; or~~

~~(iii) For farming operations that produce wool with more than 3,500 ewes; and~~

~~(3) If the farming operation seeks not more than one additional person to qualify as providing a significant contribution of active personal management because the operation is complex, then the operation may qualify for one such additional person if the farming operation is determined by the FSA state committee as complex after considering the factors described in paragraphs (a)(3)(i) and (ii) of this section. Any determination that a farming operation is complex by an FSA state committee must be reviewed and the determination must be concurred by DAFP to be applied. To demonstrate complexity, the farming operation will be required to provide information to the FSA state committee on the following:~~

~~(i) Number and type of livestock, crops, or other agricultural products produced and marketing channels used; and~~

~~(ii) Geographical area covered.~~

~~(b) FSA state committees may adjust the limitations described in paragraph (a)(2) of this section up or down by not more than 15 percent if the FSA state committee determines that the relative size of farming operations in the state requires a modification of either or both of these limitations. If the FSA state committee seeks to make a larger adjustment, then DAFP will review and may approve such request.~~

~~(c) If a farming operation seeks to qualify a total of three persons as providing a significant contribution of active personal management, then the farming operation must demonstrate both size and complexity as specified in paragraph (a) of this section.~~

~~(d) In no case may more than three persons in the same farming operation qualify as providing a significant contribution of active personal management, as defined by this subpart.~~

~~(e) (3) A person's contribution of active personal management to a farming operation specified in § 1400.601(b) will only qualify one member of that farming operation as actively engaged in farming as defined in this part. Other individual persons in the same farming operation are not precluded from making management contributions, except that such contributions will not be recognized to meet the requirements of being a significant contribution of active personal management; and~~

~~(4) A person's contribution of active personal management to a farming operation specified in § 1400.601(b) will not qualify more than one farming operation as actively engaged in farming as defined in this part.~~

Additionally, we urge that following changes to the existing rules for all other farms other than entities that include partners not related by blood or marriage.

§ 1400.1 Definitions

Active personal management means personally and on a regular, substantial, and continuing basis 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.

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 does not substantially share equipment, labor, or management with another operation and 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.

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;~~ an amount contributed by a person to the farming operation that is described by the smaller of the following:

(i) 500 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.

§ 1400.203 Joint Operations

(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, 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 limitation for a person or legal entity.

§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 or their spouse 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; [not needed if APM definition is amended]

(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 collective 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; ~~and~~

(6) No partner, stockholder, or member with an ownership interest or their spouse 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 multiple limited partnerships, limited liability companies, corporations, and other similar legal entities collectively receiving more than the applicable payment limitation for a person or legal entity.

- b. We strongly support fair and effective enforcement of the payment limitation by applying effective actively engaged in farming rules to all farming operations regardless of whether the farm is made up of family members, non-family members, or a combination of the two. Should, however, FSA decide to retain unfair and ineffective rules that limit reform to a tiny slice of all farms, then the final rule should include language to prevent farms from reorganizing into multiple joint ventures or by removing non-family members for the purpose of capturing more federal payments.**

Given that the proposed rule, for the first time, creates two separate and unequal management rules for entities that include only family members and those that contain non-family members, it creates a situation ripe for farm reorganizations to escape any impact on payments for farm entities with partners unrelated by blood or marriage. We provide a sound and comprehensive way out of that dilemma with the two-part proposal spelled out in detail above. Should FSA reject our proposal, the agency should nonetheless take all necessary and prudent steps to include strong protections in the final rule to prevent unscrupulous parties from reorganizing to take advantage of the separate and unequal management tests.

In that unfortunate circumstance, we urge FSA to make the following changes in the final rule:

§ 1400.600 Applicability.

(a) This subpart is applicable to all of the programs as specified in § 1400.1 and any other programs as specified in individual program regulations.

(b) The requirements of this subpart will apply to farming operations for FSA program payment eligibility and limitation purposes as specified in subparts B and C of this part.

(c) The requirements of this subpart do not apply to farming operations specified in paragraph (b) of this section if either:

(1) All persons who are partners, stockholders, or persons with an ownership interest in the farming operation or of any entity that is a member of the farming operation are family members as defined in § 1400.3; or

(2) The farming operation is seeking to qualify only one person as making a significant contribution of active personal management for the purposes of qualifying only one person or entity as actively engaged in farming.

(d) Any operation subject to this subpart as of the effective date for this rule cannot seek to qualify for the exemption under paragraph (c) for five years following the effective date of the rule.

3. Should there be a strict limit of one manager, or should other options be implemented to reduce the risk that individuals who have little involvement in a farming operation use the active personal management provisions to qualify the farming operation for payment?

a. No, provided FSA does not allow for more than a single combined payment limit for the farm, it does not matter how many managers qualify.

As we stated above, the number of managers any particular farm has should be a decision made by that farming operation based on its management needs, as a business decision, not as a way to capture more taxpayer subsidies. Provided our recommendations above are included in the final rule and hence no farming operation is eligible for more than a single combined payment limit, it does not matter for policy purposes how many farm managers a farm can legitimately qualify as payment eligible.

b. The active personal management test for farm entities with unrelated partners should allow for management-only participants that preform at least 500 hours of qualified management activity (or 50 percent of the commensurate share) and the active management test for all other entities should allow for 1000 hours or 50 percent of the commensurate share of labor and management, provided, in both cases, there is still a single payment limit for the operations.

We support real, comprehensive reform as outlined and detailed in the answer to question 2 above.

c. However, if FSA does not adopt comprehensive reform, there should at the very least be a strict limit of one additional manager in the final rule.

If USDA leaves the floodgates to unlimited subsidies open, then at the very least there should be only one additional manager allowed, as per the House and Senate passed farm bills. And in no case should a manager who is not providing labor qualify without providing at least 500 hours or 50 percent of their commensurate share of the management of the operation.

Congress adopted a payment limit over four decades ago to ensure a modest safety net for family farms to protect against sudden price declines and allow them to stay in business for another year. Despite re-affirming the policy of a payment cap in every farm bill since then, USDA has relentlessly pressed the case for loopholes to allow farms to collect nearly unlimited payments.

The will of the majority in Congress was made known once again by the inclusion in both the House-passed and the Senate-passed farm bills in 2013 of provisions limiting payments to a maximum of one management-only participant in the farming operation. That this democratically approved provision was overturned by a few people meeting behind closed doors speaks volumes to the corporate capture of this issue and the outsized influence of the agricultural one percent when it comes to farm subsidies.

Nonetheless, supporters of real reform were not completely shut out as the final farm bill allows the Department to consider reform via rulemaking. If FSA wants to retain any semblance of being on the side of reform, it will at the very least limit its creation of additional payment limits to one manager. This would still be a mere shadow of the one additional manager but single payment limit provision supported by the House and Senate, but would at least get rid of the other excesses in the proposed rule.

In sum, our strong preference is for comprehensive reform as outlined and specified in our answer to question 2 above. But if FSA does not adopt comprehensive reform, then we urge you to adopt a one extra manager provision in the final rule as follows:

§ 1400.3 Definitions

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 does not substantially share equipment, labor, or management with another operation and 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.

§ 1400.601 Definitions

Significant contribution of active person management means active person management activities performed by a person, with a direct or indirect ownership interest in the farming operation, on a regular, continuous, and substantial basis to the farming operation, and meets at least one of the following to be considered significant:

- (1) Performs at least ~~25~~ 50 percent of the person's commensurate share of the total management hours required for the farming operation on an annual basis; or
- (2) Performs at least 500 hours of management (not including labor) annually for the farming operation.

§ 1400.602 Restrictions on active personal management contributions.

(a) If a farming operation includes any nonfamily members as specified under the provisions of § 1400.201(b)(2) and (3), ~~and the farming operation is seeking to~~ may qualify ~~more than~~ one person as providing a significant contribution of active personal management ~~then~~ provided that:

- (1) ~~Each such~~ Such person ~~must~~ maintains contemporaneous records or logs as specified in § 1400.603; and
- (2) ~~Subject to paragraph (b) of this section, if the farming operation seeks not more than one additional person to qualify as providing a significant contribution of~~

active personal management because the operation is large, then the operation may qualify for one such additional person if the farming operation:

(i) Produces and markets crops on 2,500 acres or more of cropland; or

(ii) For farming operations that produce honey with more than 10,000 hives; or

(iii) For farming operations that produce wool with more than 3,500 ewes; and

(3) If the farming operation seeks not more than one additional person to qualify as providing a significant contribution of active personal management because the operation is complex, then the operation may qualify for one such additional person if the farming operation is determined by FSA employees as complex after considering the factors described in paragraphs (a)(3)(i) and (ii) of this section. Any determination that a farming operation is complex by an FSA state committee must be reviewed and the determination must be concurred by DAFP to be applied. To demonstrate complexity, the farming operation will be required to provide information to the FSA state committee on the following:

(i) Number and type of livestock, crops, or other agricultural products produced and marketing channels used; and

(ii) Geographical area covered.

(b) FSA state committees may adjust the limitations described in paragraph (a)(2) of this section up or down by not more than 15 percent if the FSA state committee determines that the relative size of farming operations in the state requires a modification of either or both of these limitations. If the FSA state committee seeks to make a larger adjustment, then DAFP will review and may approve such request.

(c) If a farming operation seeks to qualify a total of three persons as providing a significant contribution of active personal management, then the farming operation must demonstrate both size and complexity as specified in paragraph (a) of this section.

(d) In no case may more than three persons in the same farming operation qualify as providing a significant contribution of active personal management, as defined by this subpart.

(e) (3) A The person's contribution of active personal management to a farming operation specified in § 1400.601(b) will only qualify one member of that farming operation as actively engaged in farming as defined in this part. Other individual persons in the same farming operation are not precluded from making management contributions, except that such contributions will not be recognized to meet the requirements of being a significant contribution of active personal management; and

(4) The person's contribution of active personal management to a farming operation specified in § 1400.601(b) will not qualify more than one farming operation as actively engaged in farming as defined in this part.

4. What methods should be used to determine whether a person is actively engaged in farming for the purpose of payment eligibility and the number of managers per farming operation that may be eligible?

a. Further refine the definition of active personal management.

USDA should adopt a concrete and limited list of what activities count and do not count as significant contributions of active personal management for the purposes of meeting the time or percentage requirement.

NSAC appreciates that the proposed rule would put in place a more concrete definition of a significant contribution of active personal management. However, we recommend that the rule be explicit in listing activities that do not count as active personal management. We suggest that USDA consult the Internal Revenue Code's material participation rules when devising the final rule on what activities qualify. **We urge you to adopt the recommended language below, which was partially drawn from those rules.**

1400.601 Definitions.

(a) The terms defined in § 1400.3 are applicable to this subpart 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 subpart:

Active personal management means personally providing and participating in management activities considered critical to the profitability of the farming operation and performed under one or more of the following categories:

(1) Capital, which includes:

- (i) Arranging financing and managing capital;
- (ii) Acquiring equipment;
- (iii) Acquiring land and negotiating leases;
- (iv) Managing insurance; and
- (v) Managing participation in USDA programs;

(2) Labor, which includes hiring and managing of hired labor; and

(3) Agronomics and marketing, which includes:

- (i) Selecting crops and making planting decisions;
- (ii) Acquiring and purchasing crop inputs;
- (iii) Managing crops (that is, whatever it takes to keep the growing crops living and healthy—soil fertility and fertilization, weed control, insect control, irrigation if applicable) and making harvest decisions; and
- (iv) Pricing and marketing of crop production.

The following activities do no count as active personal management:

- (1) Performance of activities that are not customarily performed by farmers;
- (2) Any activity performed with the main reason being to qualify as actively engaged, in that it is not for the benefit and success of the business, but only to qualify for payments or a higher payment limit;
- (3) Studying and reviewing financial statements or reports on operations;
- (4) Preparing or compiling summaries or analysis of the finances or operations of the farm;
- (5) Monitoring the finances or operations of the farm in a nonmanagerial capacity;
- (6) Attendance at board meetings or conference calls; and
- (7) Watching commodity markets (without making trades).

b. Adopt in the rule IRS indicators that a person is not materially participating in a business as guidance for whether logged activities count towards the active personal management requirement.³

We appreciate the inclusion of specific record keeping requirements in the proposed rule, a requirement that has never before existed. If enforced, they will provide an important check on the covered operations. These requirements should be extended to all persons using management only to be eligible for a subsidy payment.

NSAC recommends that the record keeping requirements for those seeking to be qualified as actively engaged through active personal management reflect IRS indicators of whether a person is materially participating in a business or if they are a passive investor.

These indicators include:

- The person was not compensated for services. Most individuals do not work significant hours without expecting wage.
- The person's residence is hundreds of miles from the activity.
- The person has another job requiring 40+ hours a week for which he or she receives significant compensation.
- The person has numerous other investments, rentals, business activities, or hobbies that absorb significant amounts of time.
- There is paid on-site management/foreman/supervisor and/or employees who provide day-to-day oversight and care of the operation.
- The majority of the hours claimed are for work that does not materially impact operations.

³ <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Passive-Activity-Loss-ATG-Chapter-4-Material-Participation>

- Farm operations would continue uninterrupted if the person did not perform the services claimed.

We therefore urge you to adopt the following changes in the final rule:

§ 1400.603 Recordkeeping requirements.

(a) Any farming operation requesting that more than one person qualify as making a significant contribution of active personal management must maintain contemporaneous records or activity logs for all persons that make any contribution of any management to a farming operation under this subpart that must include, but are not limited to, the following:

(1) The location where the and distance from the farming operation where the management activity was performed;

(2) Time expended, compensation received, and duration of the management activity performed;

(3) Outside employment by the person other than the farming operation including hours worked and compensation received;

(4) A listing of outside investments, rentals, business activities, or hobbies the require significant time commitments and an estimate of hours expended on those ventures;

(5) How the management activity materially impacted the farming operation; and

(6) The presences of any paid-onsite managers not to seeking to be qualified as making a significant contribution of active personal management.

5. **Should other methods be used to determine which activities constitute a significant contribution of active personal management? Should other activities be considered as active personal management?**

See question 4 above for our comments and recommendations in response to this question.

6. **Should different standards be applied for the amount of management required for eligibility, such as a different number of hours, a percentage financial interest in the entity, or other criteria.**

See question 3 and 4 above for our comments and recommendations in response to this question.

In addition we urge you to not in any way relax the proposed rule criteria to provide eligibility to persons providing less than 500 hours or 25 percent of total required hours of active personal management. As stated above, our strong preference is to change 25 percent of total hours to 50 percent of the commensurate share, and to then apply the full test to ALL persons seeking to qualify as actively engaged in farming through management activities alone. We hope these improvements

will be adopted in the final rule. But we want to also be on record as strongly opposing any weakening of the 500 hours or 25 percent of total hours required in the final rule.

7. Should there be a different limit to the number of farm managers in a farming operation that qualify as actively engaged? If yes, how should that limit be determined?

See question 1 above for our comments and recommendations in response to this question.

8. Are there certain management activities or practices that are unique to particular farming methods, crops, or regions that should be taken into consideration?

See question 1 above for our comments and recommendations in response to this question.

To restate the case, we believe there are no management activities, farming methods, crop selection choices, farm complexity factors, marital statuses, or any other differences among farms that should have an impact on the amount of payments a farming operation is entitled to receive. The payment limit should be the payment limit. The sordid history and tradition of unlimited subsidies should come to a close, now, in the final rule. This is a very achievable goal. We have presented a roadmap in our recommendations presented above. The only thing that has been lacking to date is the political will and courage to effectively enforce the payment limitation through comprehensive reform of the actively engaged in farming rules. We urge you to find the will and courage to uphold your obligation to develop fair and effective regulations and to enforce the law.