

Farmers' Guide to COVID-19 Relief

2nd Edition

April 27, 2020

Farmer Legal Assistance Hotline
877-860-4349



Farmers' Legal Action Group

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April 27, 2020

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

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Chapter I: Introduction

This Farmers' Guide to COVID-19 Relief (2nd Edition) offers a brief description of various programs that might benefit farmers.

A. Current as of April 26, 2020

This Second Edition of the Guide is current as of April 26, 2020. As of this writing, much is yet to be decided about how the programs discussed will work. Please check the FLAG website for updates that will be ongoing.¹

The First Edition of the Guide was published on April 13, 2020. Due to changes in the programs, the Second Edition is quite different than the First Edition.

B. Overview of What this Guide Covers

Several of the programs discussed in this Guide are the product of the CARES Act—technically known as the Coronavirus Aid, Relief, and Economic Security Act.² The CARES Act became law on March 27, 2020. In addition, this Guide covers changes to the CARES Act made by the Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act), which became law on April 24, 2020.³ Despite this additional legislation, many parts of the law are not yet well understood and plans for how the CARES Act and Enhancement Act will be carried out are constantly evolving. Finally, this Guide addresses various other topics and programs that have been established in response to COVID-19 and which are likely to impact farmers.

The following sections provide a brief description of the topics that are discussed in this Guide.

1. The CARES Act Recovery Rebates for Individuals

The CARES Act creates individual recovery rebates, also known as economic impact payments. Farmers are eligible for these payments. Details on the individual recovery rebates are in Chapter Two of this Guide.

2. The CARES Act SBA Paycheck Protection Program (PPP)

The CARES Act created a new Small Business Administration (SBA) program called the Paycheck Protection Program (PPP). PPP provides loans to small businesses that can be forgiven so long as the business continues to employ workers. Farmers are eligible for the PPP. Although the original CARES Act funding for PPP ran out in mid-April, the Enhancement Act provides additional money for the program.

¹ The Farmers' Guide to COVID-19 Relief (2nd Edition) can be found on FLAG's website, at: <http://www.flaginc.org/covid-19-guide/>.

² Coronavirus Aid, Relief, and Economic Security Act (CARES Act), 116 Public Law 136, 134 Stat. 281 (March 27, 2020). As a bill, it was known as H.R. 748 (March 27, 2020). A copy can be found here: <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

³ Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act), 116 Pub Law 139 (April 24, 2020). As a bill, it was known as H.R. 266 (April 24, 2020). A copy can be found here: <https://www.congress.gov/116/bills/hr266/BILLS-116hr266enr.pdf>.

Chapter Three of the Second Edition of this Guide includes a number of recent changes to the funding and rules for PPP, including a discussion of important eligibility requirements.

3. The CARES Act SBA Economic Injury Disaster Loan (EIDL) Program

The CARES Act changed and expanded upon an existing SBA program, the Economic Injury Disaster Loan (EIDL) program, in order to make it available during the COVID-19 crisis. Under the CARES Act, small businesses can receive EIDL program loans with relaxed eligibility rules. The CARES Act also provides for a 10,000 dollar emergency advance on the loan that businesses will not need to repay. Although originally this program was unavailable to most farms, the Enhancement Act has made it clear that agricultural enterprises may now qualify for COVID-19 EIDL assistance.

Chapter Three of the Second Edition of this Guide incorporates a number of recent changes to EIDL, including changes in eligibility that allow farmers to participate in the COVID-19 EIDL program.

4. The CARES Act Unemployment Insurance

The CARES Act makes a number of changes to unemployment insurance. This Guide focuses on the Pandemic Unemployment Assistance (PUA) program, which increases the amount and length of unemployment benefits for those affected by COVID-19 may receive. Farmers, who count as unemployed self-employed individuals under the PUA, may be eligible for the program. Chapter Four discusses PUA.

5. The CARES Act Foreclosure Moratorium and Loan Forbearance

The CARES Act mandates a foreclosure moratorium and loan forbearances for some federally backed residential mortgages. As the rules for these programs are currently being interpreted, it is unlikely that they will apply to most farm mortgages, even if those mortgages include a farm homestead.

Chapter Five of this Guide discusses the foreclosure moratorium and loan forbearance parts of the CARES Act.

6. The CARES Act Funding for CCC, Specialty Crop and Other Producers

Under the CARES Act, the Commodity Credit Corporation (CCC) will receive fourteen billion dollars. An additional 9.5 billion dollars will go to USDA to assist specialty crop and other producers, including livestock producers and those supplying local food systems.

This Second Edition of the Guide describes new information that we now have about how this funding will be used. It includes a new program USDA has announced—the Coronavirus Food Assistance Program (CFAP). Chapter Six of this Guide discusses the CARES Act funding for agriculture, including a description of CFAP.

7. The CARES Act Changes to the Bankruptcy Code

Changes to bankruptcy laws are made in the CARES Act. Under the Act, it becomes easier for a small business to use a Chapter 11 bankruptcy, and income eligibility rules

for Chapters 7 and 13 will not include any payments related to COVID-19. For the most part, these changes are likely to impact farmers in only minimal ways. Chapter Seven discusses the bankruptcy changes.

8. Regulatory Guidance for Financial Institutions

Regulators of banks and other financial institutions have issued guidance that encourages loan modifications and other measures to help ease the financial burdens resulting from COVID-19. The guidance applies to farm loans. The guidance is mainly suggestive, but it could be used to help convince lenders that they should work with struggling farmers. Chapter Eight of the Second Edition of this Guide describes the various regulatory guidance that has been issued to date.

9. USDA Administrative Response

USDA's Farm Service Agency (FSA) has issued a news release outlining certain changes to rules for FSA direct and guaranteed loans. Changes have also been made on the USDA website. These changes include deadline extensions and deferral actions for direct loans as well as the suspension of some direct loan accelerations and foreclosures. FSA says it will also consider allowing temporary deferrals of loan payments for guaranteed loans. USDA also describes its availability of staff in local offices.

Chapter Nine of the Second Edition of this Guide discusses USDA's administrative response to COVID-19, including developments since the First Edition of the Guide was published.

10. Crop Insurance and Non-Insured Crop Disaster Assistance Program (NAP)

Federal crop insurance is an important risk management tool for many farmers. The Risk Management Agency (RMA) has issued internal rules that relax a few requirements for crop insurance. In general, though, it is important for farmers to understand and follow the crop insurance policies they have signed—even if the result seems to not make sense in the face of the COVID-19 crisis. Losses due to COVID-19 are not eligible losses for many crop insurance policies. For farmers with crop insurance, changes in the farming operation, especially changes to things like the type of crop raised or the acreage for various crops, should be approved by the insurance provider in advance.

The Noninsured Crop Disaster Assistance Program (NAP) is another important risk management tool for farmers. NAP provides crop loss assistance for farmers who are otherwise unable to obtain federal crop insurance for a specific crop. To date, USDA has not released any information about how NAP coverage may be affected by COVID-19. Farmers with NAP coverage should be especially careful before making any changes to their operation, and before doing so should consult FSA.

Chapter Ten discusses federal crop insurance and NAP.

11. Court and State and Tribal Government Responses

A number of state and tribal governments have responded to COVID-19. These responses include moratoriums on foreclosures and evictions, as well as limits on debt collection activities. Some courts have made changes as well, including postponing certain in-person hearings. These policy and court changes can directly affect farmers. Chapters Eleven and Twelve discuss these efforts.

12. Scams and Discrimination

Scams targeting farmers arise during times of crisis, and discrimination continues to be a problem for farmers. These issues are discussed in Chapters Thirteen and Fourteen.

C. Sources and Additional Resources

Within this Guide, the legal authority for the conclusions drawn can be found in the footnotes. For this purpose, the Guide mainly uses legally binding statutes and rules, and refers to other governmental sources. In a few cases, the Guide cites to other, non-legal sources that are especially useful.

Many other sources of information on COVID-19 relief for farmers are available and may be useful.⁴ They often cover topics not discussed in the Guide.

Finally, valuable commentary and assistance for this Guide came from Farm Aid, the Indigenous Food and Agriculture Initiative (IFAI), the Intertribal Agriculture Council (IAC), the National Sustainable Agriculture Coalition (NSAC), and the Rural Advancement Fund International-USA (RAFI-USA).

⁴ For examples, see, National Sustainable Agriculture Coalition, at: <https://sustainableagriculture.net>; ATTRA and NCAT, at: <https://attra.ncat.org/covid/>; Farm Aid, at: <https://www.farmaid.org/blog/resources-for-farmers-affected-by-covid-19/>; Farm Commons, at: <https://farmcommons.org/>; Pace-NRDC Food Law Initiative, COVID-19 Legal Support Project, at: <https://law.pace.edu/pace-nrdc-food-law-initiative>; USDA, Covid-19 Federal Rural Resource Guide, at: https://rd.usda.gov/sites/default/files/USDA_COVID-19_Fed_Rural_Resource_Guide.pdf.

Chapter Two: The CARES Act Recovery Rebates

The CARES Act creates what it calls “Recovery Rebates for Individuals.”⁵ Sometimes they are being called “Economic Impact Payments.”⁶ These payments, which have been widely discussed, will go to eligible individuals—which can include farmers.⁷

In general, a household will receive 1,200 dollars per eligible person. So, for many married couples there will be a combined payment of 2,400 dollars. Five hundred dollars per qualifying child will also be paid. There will be what is often called “means testing” to ensure individuals meet the eligibility requirements, and the amount paid amount will be reduced if the household has over a certain amount of income. The income restriction can kick in at 75,000 dollars for an individual who does not file a joint return and is not a head of household.⁸ The Internal Revenue Service (IRS) will rely largely on income tax filings for 2018 and 2019 for information such as household income and the household’s address.

A great deal has been written about this program, and on what public officials are saying they plan to do. Basic information on who is eligible for the payment is available from the IRS.⁹

⁵ CARES Act, Division A, Title 2, Subtitle A, Section 2201(a).

⁶ Internal Revenue Service (IRS), Economic Impact Payments: What You Need to Know (April 1, 2020) at <https://www.irs.gov/newsroom/economic-impact-payments-what-you-need-to-know>.

⁷ CARES Act § 2201(a). A nonresident alien is not an eligible individual for purposes of the recovery rebates. CARES Act § 2201(a).

⁸ For taxpayers who file joint returns, the restriction kicks in when the joint gross income is more than 150,000 dollars, and for a head of household the restriction is triggered at 112,500 dollars. CARES Act § 2201(a).

⁹ See Internal Revenue Service (IRS), Economic Impact Payments: What You Need to Know (March 30, 2020), at: <https://www.irs.gov/newsroom/economic-impact-payments-what-you-need-to-know>; see also Department of the Treasury, Social Security Recipients Will Automatically Receive Economic Impact Payments (April 1, 2020) at <https://home.treasury.gov/news/press-releases/sm967>.

Chapter Three: The CARES Act SBA Programs

Two types of programs are available through the CARES Act under the Small Business Administration (SBA). First, the CARES Act creates what is called the Paycheck Protection Program (PPP). Second, the CARES Act creates a two-pronged EIDL program, also through the SBA. EIDL stands for Economic Injury Disaster Loans. Both the PPP and the EIDL program are somewhat similar to existing SBA programs, but there are important differences created by the CARES Act.¹⁰ The more recent Paycheck Protection Program and Health Care Enhancement Act (the "Enhancement Act") further modified the PPP and EIDL programs.¹¹

A. SBA and Farmers

Historically, the question of the extent to which SBA programs are available to farms has been confusing. In general, SBA rules have tended to discourage loans to farms.¹² Economic Injury Disaster Loans (EIDLs) from SBA have been around for many years but have mainly been unavailable to farms.¹³ Meanwhile, under other SBA programs, business loans have gone to some farms in some cases and have also gone to value-added enterprises that are connected to farms.¹⁴ Farm-related businesses that are not what SBA thinks of as agricultural enterprises have been eligible businesses under SBA's business loan programs.¹⁵

This situation has changed in the COVID-19 world. For farmers, the central question about SBA programs for COVID-19 relief is whether the PPP and EIDL programs discussed below are available to farmers. As it stands right now, the short answer appears to be that

¹⁰ The Paycheck Protection Program becomes a part of what is known as SBA's section 7(a) Business Loan Program. See 15 U.S.C. § 636(a). Section 7(a) loans are the main SBA small business loans. See SBA, Type of 7(a) Loans, at <https://www.sba.gov/partners/lenders/7a-loan-program/types-7a-loans>. EIDL loans are under what is known as SBA's section 7(b) program. See 15 U.S.C. § 636(b). Section 7(b) loans are usually made after a natural disaster. EIDL stands for Economic Injury Disaster Loans. For more information see SBA, Disaster Loan Assistance, at <https://disasterloan.sba.gov/ela/Information/Index>. For an example of an effort to clarify the interaction between FSA and SBA see Farm Service Agency, Increasing USDA Collaboration with SBA, Notice FLP-663 (December 16, 2013). It discusses SBA loans for value-added facilities—such as cheese production for a dairy farm and a fruit drink stand at a shopping center for a small fruit producer.

¹¹ Enhancement Act, Division A—Small Business Programs, § 101(a)(1) (April 24, 2020).

¹² SBA rules, for example, say that assistance for agricultural enterprises is usually made by USDA, but loans "may be made by SBA." 13 C.F.R. § 120.103 (2020). The rules also say "farm-related businesses which are not agricultural enterprises are eligible businesses under SBA's business loan programs." In addition, SBA states that its Section 7(a) loans are available for "farms and agricultural businesses." See SBA, 7a Loan Program, Terms, Conditions, Eligibility, Special Considerations, at <https://www.sba.gov/partners/lenders/7a-loan-program/terms-conditions-eligibility#section-header-17>. According to SBA, however, those applicants should first explore FSA loans, particularly if the applicant has a prior or existing relationship with FSA.

¹³ For a discussion of the limited role SBA has had with farmers in the EIDL program, see Government Accountability Office, Disaster Assistance: USDA and SBA Could do More to Help Aquaculture and Nursery Producers, GAO-12-844 (September 11, 2012), at: <https://www.gao.gov/assets/650/648076.pdf>.

¹⁴ A USDA and SBA Memorandum of Understanding regarding lending can be found here: <https://www.usda.gov/sites/default/files/documents/usda-sba-mou.pdf>.

¹⁵ 13 C.F.R. § 120.103 (2020).

farms are eligible for PPP loans and farms are also eligible—after the passing of the Enhancement Act—for the COVID-19 EIDL program. The applicability of SBA's COVID-19 relief to farmers, as is explained below, has changed radically since the COVID-19 crisis began.

B. Paycheck Protection Program

The Paycheck Protection Program (PPP) was created by the CARES Act.¹⁶ Under this program, banks and other lenders, including the Farm Credit System, make loans guaranteed by the federal government to small businesses.¹⁷ The loans are designed to be forgiven—so long as the business continues to employ workers.

1. Funding, Availability, and Deadlines for PPP

The funding and availability of PPP has been confusing and has changed several times.

a. CARES Act and Additional Funding for PPP

The CARES Act originally gave 349 billion dollars in funding for the PPP.¹⁸ According to SBA, that money ran out by April 16, 2020.¹⁹ On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act) became law.²⁰ It gave an additional 310 billion dollars in funding for the PPP.²¹ The ebb and flow of this funding explains the changes in availability of PPP that are discussed below.

¹⁶ CARES Act § 1102(a).

¹⁷ Lenders can be existing SBA lenders, federally insured depository institutions, federally insured credit unions, and the Farm Credit System. CARES Act § 1102(a).

¹⁸ CARES Act § 1102(b).

¹⁹ The exhaustion of PPP money was announced in an SBA statement that does not now appear on the SBA list of Press Releases and Media Advisories. For reporting on the exhaustion of PPP money, see Emily Flitter, Loan Money Runs Out While Small-Business Owners Wait in Line, *New York Times* (April 16, 2020), at <https://www.nytimes.com/2020/04/16/business/coronavirus-sba-loans-out-of-money.html>; see also Mark Niquette and Jennifer Jacobs, Small Business Relief Funds Drained Fast With Many Shut Out, *Bloomberg* (April 16, 2020), at <https://www.bloomberg.com/news/articles/2020-04-16/virus-rescue-program-for-small-business-runs-out-of-money>.

²⁰ Enhancement Act, Division A—Small Business Programs § 101(a)(1) (April 24, 2020).

²¹ An official statement announced the resumption of PPP. See Joint Statement by SBA Administrator Jovita and Treasury Secretary Steven T. Mnuchin on the Resumption of the Payback Protection Program (April 24, 2020), at <https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/joint-statement-sba-administrator-jovita-carranza-and-treasury-secretary-steven-t-mnuchin-resumption>.

b. Applications Accepted Again April 27, 2020—First Come First Serve

The final application deadline for PPP is June 30, 2020.²² Funds are available on a first come first serve basis.²³ This is an important detail, especially considering that the first round of funding has already run out, and SBA temporarily stopped accepting applications.²⁴

The Enhancement Act provides additional money for the PPP. SBA says it will begin accepting PPP applications again on Monday, April 27, 2020, at 9:30 am Central Standard Time.²⁵

It is possible that at some point money will run out again, no more will be added, and people who would otherwise be eligible will not be able to take part in PPP. So far, there have been two rounds of money applied to PPP by Congress. That could be the end, or there could be more. No one knows for sure.

c. Where to Apply

According to SBA, the application for PPP will be online.²⁶ As noted above, farmers submit the PPP application apply to banks and other lenders, including

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- ²² Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, Interim Final Rule (Self-Employed PPP Interim Final Rule), 85 Fed. Reg. 21747, 21752 (April 20, 2020) (to be codified at 13 C.F.R. pt. 120); Business Loan Program Temporary Changes; Paycheck Protection Program, Interim Final Rule (First Official PPP Interim Final Rule), 85 Fed. Reg. 20811, 20811 (April 15, 2020) (to be codified at 13 C.F.R. pt. 120); Business Loan Program Temporary Changes; Paycheck Protection Program, Small Business Administration, Interim Final Rule (Initial PPP Interim Final Rule), at 2 (to be codified at 13 C.F.R. part 120), at: <https://content.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL.pdf>. SBA released this version of the rules on April 2, 2020. When filling out an application for PPP, the borrower must certify that the borrower complies with civil rights requirements and does not discriminate in any business practice. See PPP Borrower Application Form, pages 2, 4. Specifically, borrowers must comply with 13 C.F.R. pts. 112, 113, and 117 (2020).
- ²³ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21752 (April 15, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 13 (April 2, 2020).
- ²⁴ SBA published the first application form for PPP on April 3, 2020. Small businesses and sole proprietorships could apply for the PPP beginning April 3, 2020. Independent contractors and self-employed individuals could apply starting April 10, 2020. However, because the program ran out of money, SBA temporarily stopped accepting PPP applications. For the first application form SBA released, see SBA, Payback Protection Program Borrower Application Form (April 3, 2020), <https://www.sba.gov/document/sba-form--paycheck-protection-program-borrower-application-form>. A pdf of the original application can be found at: <https://www.sba.gov/sites/default/files/2020-04/PPP-Borrower-Application-Form-Fillable.pdf>.
- ²⁵ See Small Business Association (SBA), Paycheck Protection Program, Notice: PPP Resumes April 27, 2020, at: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program#section-header-0>.
- ²⁶ See SBA website, at: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>. A pdf of the PPP application can be downloaded at: <https://www.sba.gov/document/sba-form--paycheck-protection-program-borrower-application-form>.

the Farm Credit System, who make loans to small businesses.²⁷ The loans are then guaranteed by the federal government.

Under the Enhancement Act, some of the PPP funding has been set aside for smaller financial institutions to make PPP loans.²⁸ This means that there is now targeted funding for people in areas that are not well serviced by big banks.

d. Applications Previously Submitted

With the bouncing back and forth of PPP availability, and the first-come-first-serve rules for a program that has already run out of money once, an important question concerns whether PPP applications that were already in the system will be automatically processed when the program begins accepting applications again on April 27, 2020, or whether people will need to re-apply.

SBA and the Treasury Department issued a nonbinding statement on April 24, 2020, that encourages lenders "to process loan applications previously submitted by eligible borrowers and disburse funds expeditiously."²⁹ It seems, therefore, that once an application is submitted it should not be discarded during a time that no applications are accepted. Instead, lenders and SBA should go back and process the PPP applications that have already been submitted. There should be no need to re-submit an application because SBA temporarily ran out of money for the program. It probably makes sense for applicants to try to verify with lenders that their application is being processed.

e. If an Application Was Denied

If someone applies for PPP and is denied by the lender, the reopening of PPP does not mean that that application will be reconsidered. The possibility of an appeal of a decision in an SBA program is discussed later in this Chapter.

2. Rules and Regulations for PPP

The rules for PPP have been released in an ongoing and confusing way. It can therefore be difficult to understand exactly how SBA is administering the program.

So far, there are several notable sources of the rules for PPP.³⁰

²⁷ Lenders can be existing SBA lenders, federally insured depository institutions, federally insured credit unions, and the Farm Credit System. CARES Act § 1102(a).

²⁸ Enhancement Act § 101(d). The Enhancement Act requires that 30 billion dollars be set aside for "community financial institutions," FDIC-insured banks with consolidated assets of less than ten billion dollars, and credit unions with consolidated assets of less than 10 billion dollars. An additional 30 billion dollars is set aside for FDIC-insured banks and credit unions with consolidated assets between 10 billion dollars and 50 billion dollars.

²⁹ See Small Business Association (SBA), Joint Statement by SBA Administrator Jovita Carranza and Treasury Secretary Steven T. Mnuchin on the Resumption of the Paycheck Protection Program (April 24, 2020), at: <https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/joint-statement-sba-administrator-jovita-carranza-and-treasury-secretary-steven-t-mnuchin-resumption>.

³⁰ Not discussed here are Regulatory Capital Rule: Paycheck Protection Program Lending Facility and Paycheck Protection Program Loans, 85 Fed. Reg. 23212 (April 27, 2020), at <https://www.govinfo.gov/content/pkg/FR-2020-04-27/pdf/2020-08920.pdf>, and Regulatory Capital

a. CARES Act (March 27, 2020)

The CARES Act, which became law on March 27, 2020, created the PPP.³¹

b. Interim Final Rule (April 2, 2020)

On April 2, 2020, SBA released an interim final rule for PPP that did not appear in the Federal Register, but instead was posted on SBA's website.³² It seems this rule was the basis for SBA's first administration of the PPP, though SBA said the rule would not become official until it was published in the Federal Register.³³

This Guide refers to this as the "Initial PPP Interim Final Rule."

c. Interim Final Rule (April 15, 2020—First Rule of the Day)

On April 15, 2020, SBA published in the Federal Register an interim final rule that appears to be nearly identical to the Initial PPP Interim Final Rule and is likely the official version of that rule.³⁴

This Guide refers to this as the "First Official PPP Interim Final Rule."

d. Interim Final Rule (April 15, 2020—Second Rule of the Day)

On April 15, 2020, SBA published a second interim final rule in the Federal Register that provides more information on how SBA affiliation rules apply to the PPP.³⁵

This Guide refers to this as the "Affiliation Interim Final Rule."

e. Interim Final Rule (April 20, 2020)

On April 20, 2020, SBA published another interim final rule that provides a detailed discussion of PPP rules for self-employed individuals.³⁶ This rule provides information about those who use a 2019 Form 1040 Schedule C, "Profit

Rule: Paycheck Protection Program Lending Facility and Paycheck Protection Program Loans, 85 Fed. Reg. 20387 (April 13, 2020) (to be codified at 12 C.F.R. pts. 3, 217, 324 (interim final rule)), at <https://www.govinfo.gov/content/pkg/FR-2020-04-13/pdf/2020-07712.pdf>.

³¹ CARES Act § 1102.

³² Business Loan Program Temporary Changes; Paycheck Protection Program, Small Business Administration, Interim Final Rule (to be codified at 13 C.F.R. part 120), at: <https://content.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL.pdf>. SBA released this version of the rules on April 2, 2020.

³³ Initial PPP Interim Final Rule, at 1 (April 2, 2020).

³⁴ Business Loan Program Temporary Changes; Paycheck Protection Program, Interim Final Rule (First Official PPP Interim Final Rule), 85 Fed. Reg. 20811 (April 15, 2020) (to be codified at 13 C.F.R. pt. 120).

³⁵ Business Loan Program Temporary Changes; Paycheck Protection Program, Interim Final Rule (Affiliation Interim Final Rule), 85 Fed. Reg. 20817 (April 15, 2020) (to be codified at 13 C.F.R. pt. 121).

³⁶ Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, Interim Final Rule (Self-Employed PPP Interim Final Rule), 85 Fed. Reg. 21747 (April 20, 2020) (to be codified at 13 C.F.R. pt. 120).

or Loss from Business.” As will be discussed below, not all self-employed individuals use a Schedule C, including most farmers, and therefore the applicability of this rule to other self-employed individuals is uncertain.

This Guide refers to this as the “Self-Employed PPP Interim Final Rule.”

f. Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act) (April 24, 2020)

The Paycheck Protection and Health Care Enhancement Act, which became law on April 24, 2020, changed some of the PPP rules from the CARES Act.³⁷

This Guide refers to this as the “Enhancement Act.”

g. General SBA Rules (Created Before the COVID-19 Crisis)

In some cases, the PPP relies on rules created by SBA that apply to other SBA programs as well.³⁸

h. Other Official Materials (Released Since March 27, 2020)

In addition to the various PPP rules mentioned above, other official materials have been released in various way since the enactment of the CARES Act on March 27, 2020. SBA has issued a Paycheck Protection Program (PPP) Information Sheet.³⁹ This information sheet refers borrowers to SBA information about eligibility for businesses based on their size.⁴⁰ The Treasury Department has a Paycheck Protection Program Loans Frequently Asked Questions (FAQs) page that is sometimes updated.⁴¹ There are also press statements issued by SBA, and SBA has put some useful information on its website.⁴²

3. PPP Eligibility Rules

The following sections describe PPP eligible rules.

a. Various Kinds of Smaller Businesses are Eligible

In general, two categories of businesses are eligible for PPP. In different ways, each of these categories is based on size and requires that businesses be relatively

³⁷ Enhancement Act § 101.

³⁸ For example, some SBA affiliation rules also apply to PPP borrowers. See 13 C.F.R. § 121.301 (2020).

³⁹ Paycheck Protection Program (PPP) Information Sheet: Borrowers, at: <https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf>.

⁴⁰ Small Business Administration (SBA), Contracting Guide, Size Standards, at: <https://www.sba.gov/federal-contracting/contracting-guide/size-standards>.

⁴¹ Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs) (April 26, 2020), at: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>. This FAQ page notes that it does not carry the force and effect of law beyond what is stated in the statutes and regulations.

⁴² See SBA, Payback Protection Program (April 26, 2020), at <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

small in order to qualify for PPP. The vast majority of farms in the United States are small enough to fall within one of these categories and be eligible for PPP.

First, a variety of smaller entities are eligible for PPP. These include businesses in general,⁴³ as well as tribal business concerns,⁴⁴ tax-exempt nonprofits,⁴⁵ and tax-exempt veterans organizations.⁴⁶ The PPP application allows a variety of other business entities as well.⁴⁷ To be eligible, these entities must be small in that they generally must not have more than 500 employees.⁴⁸ For this purpose, part-time employees, full-time employees, and people hired on another basis, all count as individual employees.⁴⁹ The employees must have their principal place of residence in the United States, and they must have been paid salaries and payroll taxes or been paid as independent contractors.⁵⁰ It is also possible, however, that a business, nonprofit, veterans organization or tribal business concern can be eligible for PPP if it has more than 500 employees, so long as it meets SBA's employee-based size standards for the industry in which it operates.⁵¹

⁴³ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 6 (April 2, 2020).

⁴⁴ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 6 (April 2, 2020). A tribal business concern is further described according to 15 U.S.C. § 657a(b)(2)(C).

⁴⁵ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 6 (April 2, 2020). Eligible nonprofits are those described in the Internal Revenue Code as 501(c)(3) organizations.

⁴⁶ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 6 (April 2, 2020). Eligible veterans organizations are those described in the Internal Revenue Code as 501(c)(19) organizations.

⁴⁷ The PPP application form allows applicants to check boxes if they are a: (1) partnership; (2) C Corporation; (3) S Corporation; (4) limited liability company (LLC); (5) 501(c)(3) nonprofit; (6) 501(c)(19) veterans organization; (7) tribal business; and (8) "other." PPP Borrower Application Form, at 1. This is the version of the application available as of April 26, 2020.

⁴⁸ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 5-6 (April 2, 2020). See also Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 3 (April 26, 2020).

⁴⁹ CARES Act § 1102(a)(2); Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 36 (April 26, 2020).

⁵⁰ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 5-6 (April 2, 2020); PPP Borrower Application Form, at 2.

⁵¹ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 5 (April 2, 2020). See also Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 2 (April 26, 2020). The vast majority of farms in the United States have under 500 employees and therefore will be eligible for PPP without needing to meet SBA's size-based industry standards. This Guide does not discuss those standards in detail. For more information on SBA's size-based industry standards, see Small Business Association (SBA), Size Standards, at: www.sba.gov/size.

Second, “small business concerns” are eligible for PPP.⁵² SBA rules define a small business concern.⁵³ This definition is very detailed, and every aspect must be met in order to qualify for PPP as a small business concern. A business that meets SBA’s definition of a small business concern does not need to have fewer than 500 employees in order to be eligible for PPP.⁵⁴

b. Self-Employed Individuals, Sole Proprietorships, and Independent Contractors can be Eligible

PPP allows self-employed individuals, sole proprietorships, and independent contractors to be eligible as borrowers.⁵⁵

(i) Four Eligibility Rules for Self-Employed—Including Farmers

To eligible for a PPP loan, a self-employed individual, including a self-employed farmer, must meet four requirements.⁵⁶

First, the self-employed person must have been in operation on February 15, 2020.⁵⁷

Second, a self-employed person must have self-employment income.⁵⁸ This can be, for example, income from an independent contractor or a sole proprietor.

⁵² CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 6 (April 2, 2020). The CARES Act, the First Official Interim Final Rule, and the Initial PPP Interim Final Rule refer to the statute that defines small business concerns, 15 U.S.C. § 632. SBA also has extensive rules defining small businesses. See 13 C.F.R. part 121, subpart A (2020). Some of these rules are not in effect for PPP due to the CARES Act. The definition of a small business concern is also found in SBA, Small Business Compliance Guide: Size and Affiliation (June 2018), at: https://www.sba.gov/sites/default/files/2018-09/2018-07-13%20AFFILIATION%20GUIDE_Updated%20%281%29.pdf.

⁵³ For SBA’s definition of a small business concern, see 15 U.S.C. § 632(a). A more detailed definition and explanation of a small business concern is also found in SBA, Small Business Compliance Guide: Size and Affiliation (June 2018), at: https://www.sba.gov/sites/default/files/2018-09/2018-07-13%20AFFILIATION%20GUIDE_Updated%20%281%29.pdf.

⁵⁴ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 6 (April 2, 2020). See also, Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 2 (April 26, 2020). The Treasury’s PPP FAQ page provides the example that an eligible small business concern could include a business that meets SBA’s “alternative size standard” of having a tangible net worth of not more than fifteen million dollars, and an average net income (after Federal income taxes) for the previous two full fiscal years before the date of the PPP application of not more than five million dollars.

⁵⁵ CARES Act § 1102(a)(2); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 15, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 6 (April 2, 2020). The PPP application form allows applicants to check boxes if they are a: (1) sole proprietor; (2) independent contractor; or (3) eligible self-employed individual. PPP Borrower Application Form, at 1.

⁵⁶ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 15, 2020).

⁵⁷ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 15, 2020).

⁵⁸ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 15, 2020).

Third, the self-employed person must have a principal place of residence in the United States.⁵⁹

Fourth, the self-employed person must have filed, or intend to file, a 2019 IRS Form 1040 Schedule C.⁶⁰ This requirement is confusing and has important implications for farmers. It is discussed in the next section.

(ii) Schedule C and Farmer Eligibility

As the above section noted, to be eligible for PPP as a self-employed person, the applicant must have filed, or have plans to file, a 2019 Form 1040 Schedule C.⁶¹

It appears SBA is interested in the financial tax records for the small businesses that apply for PPP. For those who filed (or will file) a 2019 Form 1040 Schedule C, the Self-Employed PPP Interim Final Rule provides detailed guidance on PPP eligibility.⁶² For farmers, however, it is more complicated because they often do not file a Schedule C. While a detailed discussion of federal taxation is far beyond the scope of this Guide, the current Schedule C eligibility requirement forces farmers to think about these issues.

Different kinds of business tend to file different tax forms. For corporations, the tax form filed will generally be a Form 1120, the "U.S. Corporation Income Tax Return."⁶³ The focus for this Guide, however, is the tax forms that smaller businesses use.

Smaller businesses, especially those where there is a sole proprietorship, will often use an IRS Form 1040, the "Individual Income Tax Return."⁶⁴ This is the familiar form that individuals tend to use. A sole proprietorship might be organized as a limited liability company (LLC), may be a sole proprietor that is not an incorporated business, or may be an independent contractor. In each of those cases, the sole proprietor uses an IRS Form 1040. IRS Form 1040 has a line for "other income" from what is called "Schedule 1, Additional Income and Adjustments to Income."⁶⁵ Schedule 1, in turn, has a line for "business income or (loss)."

⁵⁹ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 15, 2020).

⁶⁰ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 15, 2020).

⁶¹ According to the Self-Employed PPP Interim Final Rule, a partner in a partnership may not file a separate PPP loan application as a self-employed individual. Instead, the partnership may file a PPP loan application and report the self-employment income of the general active partners as payroll costs. See Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 15, 2020).

⁶² Self-Employed PPP Interim Final Rule, See 85 Fed. Reg. 21747, 21748 (April 15, 2020).

⁶³ See Form 1120, U.S. Corporation Tax Return for 2019, at: <https://www.irs.gov/pub/irs-pdf/f1120.pdf>. IRS rules describe which businesses should be taxed as corporations. See IRS Publication 542, Corporations 2-3 (January 2019), at: <https://www.irs.gov/pub/irs-pdf/p542.pdf>.

⁶⁴ Form 1040, U.S. Individual Income Tax Return (2019), at: <https://www.irs.gov/pub/irs-pdf/f1040.pdf>. They also might use IRS Form 1040-SR, U.S. Tax Return for Seniors (2019), at: <https://www.irs.gov/pub/irs-pdf/f1040s.pdf>. See IRS Publication 554, Tax Guide for Seniors (2019), at: <https://www.irs.gov/pub/irs-pdf/p554.pdf>.

⁶⁵ Schedule 1 (Form 1040 or 1040-SR), Additional Income and Adjustments to Income (2019), at: <https://www.irs.gov/pub/irs-pdf/f1040s1.pdf>.

To get that number, the taxpayer must use "Schedule C, Profit or Loss From Business."⁶⁶ Schedule C, in other words, is the IRS tax form that describes a sole proprietor's business income and expenses. Expenses on Schedule C include wages paid.

In sum, to be eligible for PPP, a self-employed person, sole proprietor, and independent contractor must use a Schedule C form for federal income tax purposes. It is not surprising that for the PPP program a self-employed person must produce some documentation from Schedule C.

The problem for farmers is that the Self-Employed PPP Interim Final Rule seems to assume that every self-employed person files a Schedule C, when in fact the overwhelming majority of self-employed farmers do not file a Schedule C.⁶⁷ Most farmers file a Schedule F, "Profit and Loss from Farming," as well as a Form 1040.⁶⁸ For these farmers, the process is much like it is for other small business. Generally, a Form 1099 is filed, and Form 1099 requires a Schedule 1, and the Schedule 1 has a place for Schedule F.⁶⁹ Like Schedule C, Schedule F has a line for the cost of labor hired. In other words, the Schedule F serves a similar function for the taxpayer as does a Schedule C, but one is for a small business, and one for a farm.

Unfortunately, the Self-Employed PPP Interim Final Rule appears to require a Schedule C when applying for PPP, which many farmers simply do not have. The Rule does not mention a Schedule F, and does not discuss PPP eligibility for self-employed people who do not file a Schedule C.

On April 24, 2020, however, the Treasury Department released guidance that says farmers can use Schedule F in place of Schedule C.⁷⁰ Specifically, it says self-employed farmers who report their net farm profits on IRS Form 1040 Schedule 1 and Schedule F should use Schedule

⁶⁶ IRS Schedule C, Profit or Loss from Business (2019), at <https://www.irs.gov/pub/irs-pdf/f1040sc.pdf>. See, as well, IRS Publication 334, Tax Guide for Small Business (For Individuals Who Use Schedule C) (2019), at: <https://www.irs.gov/pub/irs-pdf/p334.pdf>.

⁶⁷ Farm taxes are discussed in IRS Publication 225, Farmers Tax Guide (2019), at: <https://www.irs.gov/pub/irs-pdf/p225.pdf>.

⁶⁸ According to the IRS, a Schedule F is the form used to report farm income by individuals, trusts, partnerships, S corporations, LLCs that are taxes and partnerships, and sole members of a domestic LLC. See Internal Revenue Service, Farmer's Tax Guide, Publication 225 (2019), at: <https://www.irs.gov/pub/irs-pdf/p225.pdf>. See Schedule F, Profit or Loss From Farming (2019), at: <https://www.irs.gov/pub/irs-pdf/f1040sf.pdf>. Some farmers file as a partnership. That means using a Form 1065, U.S. Return of Partnership Income (2019), at: <https://www.irs.gov/pub/irs-pdf/f1065.pdf>. Even a Form 1065, however, includes net farm profit or loss. And asks the tax payer to include a Schedule F. Partnership filing are discussed in IRS Publication 541, Partnerships (2019), at: <https://www.irs.gov/pub/irs-pdf/p541.pdf>; and in IRS, 2019 Instructions for Schedule C (2019), at: <https://www.irs.gov/pub/irs-pdf/i1040sc.pdf>.

⁶⁹ See IRS Form 1099-MISC (2020), at: <https://www.irs.gov/pub/irs-pdf/f1099misc.pdf>.

⁷⁰ Treasury Department, Paycheck Protection Program: How to Calculate Maximum Loan Amounts—By Business Type, Question 3 (April 24, 2020), at: <https://home.treasury.gov/system/files/136/How-to-Calculate-Loan-Amounts.pdf>. If the rules had not changed, almost all farmers would not have been able use the PPP program.

F in place of Schedule C. It is important to note that this guidance expressly says that it “does not carry the force and effect of law independent of the statute and regulations on which it is based.”⁷¹ That said, according to the Treasury Department, SBA will use this guidance to implement PPP.

Any farmers who have been discouraged from applying for a PPP by a lender, or have been denied by a lender, should try again. If the lender is not aware of the possibility of using a Schedule F, show the lender this Guide, and feel free to call FLAG for assistance.

c. Farm Eligibility and PPP

Despite some confusion on this question, agricultural producers, farmers, and ranchers can be eligible for PPP.⁷² The vast majority of farms will qualify as sole proprietorships or under the category of self-employed individuals.

As noted above, in general for self-employed people, including farmers, if the business has less 500 employees it will not be too large to be eligible for PPP.

A Treasury Department Frequently Asked Questions (FAQs) page for PPP confirms that “agricultural producers, farmers, and ranchers” are eligible for PPP.⁷³ Farm cooperatives are also eligible.⁷⁴ The FAQ adds details that suggest some farms with more than 500 employees can still be eligible.⁷⁵

Farms that have year-round workers are likely to be most benefited by the program. For farms with employees, independent contractors are not counted when calculating the farm's PPP loan amount.⁷⁶ This is because independent contractors can themselves apply for a PPP loan.

⁷¹ Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, page 1 (April 24, 2020).

⁷² Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 34 (April 26, 2020).

⁷³ Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 34 (April 26, 2020).

⁷⁴ Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 35 (April 26, 2020).

⁷⁵ According to the PPP FAQ page, in order for a farm or ranch to qualify for PPP it must either: (1) have 500 or fewer employees, or meet SBA's revenue-based size standard of average annual receipts of one million dollars or less; or (2) qualify as a small business concern if the farm or ranch meets SBA's alternative size standard, meaning that it has a maximum net worth of not more than fifteen million dollars, and an average net income (after Federal income taxes) for the previous two full fiscal years before the date of the PPP application of not more than five million dollars. See Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 34 (April 26, 2020).

⁷⁶ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 11 (April 2, 2020). In addition, to benefit from the program, farms need to have employment costs now. If hired labor is only used seasonally, there might not be enough labor costs to allow forgiveness of the loan.

d. Farms and SBA Affiliation Rules

In order to be eligible for a PPP loan, the borrower must meet what SBA calls “affiliation” rules.⁷⁷ The goal of these rules is to address the possibility that a large company that would not be eligible for an SBA small business loan (called a Section 7(a) loan) might control a small company that would otherwise be eligible for such a loan. SBA affiliation rules try to identify when a smaller company is under the control of another company such that the smaller company does not operate independently. In those situations, SBA will not make a loan to the smaller company. Under the CARES Act, and related regulation, SBA affiliation rules are waived for certain types of businesses.⁷⁸

In the First Official PPP Interim Final Rule, SBA stated that it would issue additional rules for the way SBA affiliation rules would apply to PPP.⁷⁹ It did so on April 15, 2020, when it published in the Federal Register an interim final rule that discusses affiliation (the “Affiliation Interim Final Rule”).⁸⁰ In the Affiliation Interim Final Rule, SBA clarifies that in most cases businesses will be considered together with their affiliates for purposes of PPP eligibility.⁸¹

Under the Affiliation Interim Final Rule, there are two primary ways to meet the affiliation requirements and be eligible for PPP. First, a borrower is eligible for PPP if the borrower and its affiliates, combined, can meet the SBA definition of a small business.⁸² Second, a borrower can be eligible for PPP if it is a tax-exempt nonprofit, tax-exempt veterans organization, tribal business concern, or any

⁷⁷ CARES Act § 1102(a)(2); Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20818 (April 15, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 6(April 2, 2020). The Federal Register clarifies that the SBA affiliation rules that apply to PPP borrowers are found at 13 C.F.R. § 121.301 (2020). See Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20818-20819 (April 15, 2020); see also, Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 5 (April 26, 2020). Affiliation rules for PPP are also discussed in a Treasury Department posting, Affiliation Rules Applicable to U.S. Small Business Administration Paycheck Protection Program (April 3, 2020), at <https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf>.

⁷⁸ CARES Act § 1102(a)(2); Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20818 (April 15, 2020). Specifically, the affiliation rules at 13 C.F.R. §§ 121.103 and 121.301 are waived for: (1) any business concern with 500 or fewer employees that, on the day the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern that operates as a franchise and is assigned a franchise identifier code by SBA; and (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958. In addition, SBA rules also exempt qualified faith-based organizations from SBA's affiliation rules in situations where the affiliation rules would “substantially burden those organizations’ religious exercise,” and neither SBA nor lenders will assess the reasonableness of a faith-based organization’s determination of whether it is exempt from SBA’s affiliation rules. See Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20819-20820 (April 15, 2020).

⁷⁹ See First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 7 (April 2, 2020).

⁸⁰ Affiliation Interim Final Rule, 85 Fed. Reg. 20817 (April 15, 2020).

⁸¹ Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20818 (April 15, 2020).

⁸² Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20818 (April 15, 2020). The borrower must be a small business as set out in the Small Business Act. The relevant section of the Small Business Act is at 15 U.S.C. § 632(a).

other business concern.⁸³ To be eligible under this second method, the business must either have 500 or fewer employees whose principal place of residence is in the United States, or it must meet SBA's size-standards for its industry.⁸⁴

Affiliation rules would often be a small technical detail, but they have been important and controversial when it comes to some SBA loans to farms.⁸⁵ In the past, SBA has made significant loans to contract poultry growers. An argument, however, has been made that contract poultry farmers are so closely tied to poultry integrators that they should not be allowed to receive SBA loans under the normal Section 7(a) SBA loan program.⁸⁶ In response to that argument, and in an attempt to ensure that "only independently owned and operated small businesses" receive Section 7(a) SBA loans, an interim final rule was published that went into effect on March 11, 2020.⁸⁷ This rule changed the affiliation rules to make it harder for some businesses, such as contract poultry growers, to receive Section 7(a) SBA loans.⁸⁸ The CARES Act, however, permanently rescinded that interim final rule.⁸⁹ It is therefore unclear, for purposes of PPP loans, how SBA will treat certain agricultural businesses that arguably are affiliated with larger businesses. This means that farms that have production contracts—such as those to raise poultry or hogs—may be in danger of not being eligible for PPP because of affiliation rules. It may also mean that larger value-added enterprises, with several connected business units, may not be eligible.

e. Immigration Status

Immigration status appears not to play any role in the PPP program—either for applicants or an applicant's employees.

⁸³ The CARES Act states that the affiliation standards found in 13 C.F.R. § 121.103 apply to tax-exempt nonprofits and tax-exempt veterans organizations just as they apply to small business concerns. CARES Act § 1102(a)(2). The Affiliation Interim Final Rule clarifies that the applicable affiliation standards for tax-exempt nonprofits and tax-exempt veterans organizations are found at 13 C.F.R. § 121.301, and not 13 C.F.R. § 121.103. See Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20818-20819 (April 15, 2020).

⁸⁴ Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20818-20819 (April 15, 2020).

⁸⁵ See, for example, the SBA, Office of Inspector General, Evaluation of SBA 7(A) Loans Made to Poultry Farmers, Report Number 18-13 (March 6, 2018), at: <https://www.sba.gov/sites/default/files/2019-07/SBA-OIG-Report-18-13.pdf>. In this Report, SBA's Office of Inspector General concluded that loans to contract poultry farmers had violated SBA affiliation rules.

⁸⁶ See SBA, Office of Inspector General, Evaluation of SBA 7(A) Loans Made to Poultry Farmers, Report Number 18-13.

⁸⁷ Express Loan Programs: Affiliation Standards, 85 Fed. Reg. 7622, 7638 (Feb. 10, 2020) (to be codified at 13 C.F.R. pts. 103, 120, and 121) (interim final rule)).

⁸⁸ Express Loan Programs: Affiliation Standards, 85 Fed. Reg. 7622, 7651 (Feb. 10, 2020) (to be codified at 13 C.F.R. pts. 103, 120, and 121) (interim final rule)).

⁸⁹ CARES Act § 1102(e) (rescinding Express Loan Programs; Affiliation Standards, 85 Fed. Reg. 7622 (Feb. 10, 2020) (to be codified at 13 C.F.R. pts. 103, 120, and 121) (interim final rule)).

f. Business Must Have Been in Operation as of February 15, 2020

To be eligible as a PPP borrower, the business, sole proprietorship, independent contractor, or self-employed individual must have been in operation as of February 15, 2020.⁹⁰

g. Other Eligibility Rules

SBA rules explain that certain potential borrowers are not eligible for PPP.⁹¹ These include those that: (1) have received an SBA loan in the past and are delinquent on the loan or defaulted on it; (2) are engaged in any activity that is illegal under federal, state, or local law; (3) are considered a "household employer," meaning individuals who employ household employees such as nannies or housekeepers;⁹² and (4) have an owner, with a twenty percent or greater interest in the business, who is incarcerated, on probation, on parole, has been convicted of a felony within the last five years, or is presently subject to formal criminal charges.⁹³

h. Documenting PPP Eligibility, Including for Self-Employed

PPP borrowers must provide documentation, such as payroll processor records, payroll tax filings, Form 1099-MISC forms, or income and expense sheets from sole proprietors, in order to establish their PPP eligibility.⁹⁴ If no such documents are available, the borrower must provide other supporting documentation, such as bank records, that demonstrate the qualifying payroll amount.⁹⁵

⁹⁰ CARES Act § 1102(a)(2); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 15, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 6 (April 2, 2020).

⁹¹ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 7 (April 2, 2020). Nonprofits are allowed, although they are not usually under SBA rules. General SBA rules that apply are at 13 C.F.R. 120.100. Business not eligible are identified in 13 CFR 120.110. Further SBA rules that apply for PPP can be found in SBA, Lender and Development company Programs, SOP 50 10 5(k), pages 91-145 (April 1, 2019), at:

<https://www.sba.gov/sites/default/files/2019-02/SOP%2050%2010%205%28K%29%20FINAL%202.15.19%20SECURED%20copy%20paste.pdf>.

⁹² First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 7 (April 2, 2020). According to the Federal Register and the Initial PPP Interim Final Rule, household employers do not qualify as businesses.

⁹³ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 7 (April 2, 2020).

⁹⁴ The CARES Act seems to suggest that only sole proprietors, independent contractors, and self-employed individuals need to document eligibility. CARES Act § 1102(a)(2). The regulations created by SBA can be read to suggest documentation requirements are not required for all borrowers, but in a different place to suggest that they are. Compare First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020) with First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20815 (April 15, 2020), and compare Initial PPP Interim Final Rule, at 6 with Initial PPP Interim Final Rule, at 23 (April 2, 2020). See, as well, Application Form, at 2.

⁹⁵ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812, 20815 (April 15, 2020); Initial PPP Interim Final Rule, at 6, 23 (April 2, 2020).

(i) Documentation for Self-Employed Schedule C Filers

PPP documentation rules for the self-employed rely heavily on IRS Form 1040 Schedule C.⁹⁶ As explained above, Schedule C is commonly used for tax purposes for self-employed people. For self-employed individuals who have filed (or will file) a 2019 Schedule C, the documentation requirements are outlined in the Self-Employed Interim Final Rule. According to this Rule, a self-employed borrower must provide their 2019 Schedule C, along with documentation demonstrating that the borrower is self-employed, such as a 2019 IRS Form 1099-MISC, invoices, bank statements, or books of record.⁹⁷

For self-employed individuals with employees, Form 941 or other tax forms showing payroll processor records must also be provided, in addition to evidence of any retirement and health insurance contributions, if applicable.⁹⁸ Additionally, in order to establish that the individual was in operation on February 15, 2020, a payroll statement or similar documentation from that pay period must be submitted.

(ii) Documentation for Self-Employed Farmers Who File Schedule F

As described in detail above, self-employed farmers do not typically file a Schedule C. Treasury Department guidance, issued April 24, 2020, advises that self-employed farmers should provide their 2019 IRS Form 1040 Schedule 1 and Schedule F with their PPP applications.⁹⁹ For farmers who do provide a Schedule 1 and Schedule F, the documentation requirements for self-employed Schedule C filers, described above, should also be followed.

4. The Loan Amount, Terms, and Potential Forgiveness

A PPP loan is intended to help keep workers on payroll by providing forgivable loans to small businesses. The amount of the loan is based on business payroll costs.

The following sections describe payroll costs, how PPP loan amounts are calculated, the terms of the loans, and how they can be forgiven.

⁹⁶ See generally Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747 (April 15, 2020).

⁹⁷ See Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020); see also Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 1 (April 24, 2020). Both the Self-Employed PPP Interim Final Rule and the Treasury Department guidance state that in order to substantiate the applied-for loan amount, a self-employed individual must provide a 2019 Form 1040 Schedule C with the PPP application, regardless of whether the borrower actually filed a 2019 Schedule C.

⁹⁸ The Self-Employed PPP Interim Final Rule also requires that self-employed borrowers with employees provide state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019, or equivalent payroll processor records. Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020).

⁹⁹ Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 3 (April 24, 2020).

It is notable that the rules rely heavily on Schedule C tax forms for self-employed applicants. For farmers, it appears that a Schedule F will meet this requirement.¹⁰⁰

As will be noted below, one important part of the loan amount calculation is the net profit from the farm. If the farmer's net profit on line 34 of Schedule F is zero or less, the farmer is not eligible for a PPP loan.¹⁰¹

a. Payroll Costs Defined

PPP loans are based on a borrower's payroll costs, which are essentially the compensation costs for workers.¹⁰²

For businesses that are eligible for PPP, payroll costs are defined as: (1) salaries, wages, commissions, or similar compensation; (2) cash tips; (3) employee benefits, such as payment for vacation, parental, family, medical or sick leave;¹⁰³ (4) allowance for separation or dismissal; (5) payments for the provision of employee group health care coverage, including insurance premiums; (6) retirement benefits; and (7) payment of state and local taxes assessed on compensation of employees.¹⁰⁴

To be included in a business' eligible payroll costs, employees must have their principal residence in the United States.¹⁰⁵ Further, because independent contractors can apply on their own for a PPP loan, a business cannot count any independent contractor's wages, commissions, income, or similar compensation when calculating the business' payroll costs.

For independent contractors, sole proprietors, and, probably, the self-employed, payroll costs are defined as wages, commissions, income, and net earnings from self-employment or similar compensation.¹⁰⁶

¹⁰⁰ Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 3 (April 24, 2020).

¹⁰¹ Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Questions 1, 3 (April 24, 2020).

¹⁰² First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 10 (April 2, 2020).

¹⁰³ Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Public Law 116-127) do not count towards payroll costs for PPP. CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 11 (April 2, 2020).

¹⁰⁴ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 10 (April 2, 2020).

¹⁰⁵ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 11 (April 2, 2020).

¹⁰⁶ CARES Act § 1102(a)(2); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749-21750 (April 15, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 10 (April 2, 2020). The First Official PPP Interim Final Rule does not expressly include the definition of payroll costs for the self-employed. But this seems likely to be an oversight.

The amount of payroll costs that will be considered under the PPP are capped at \$100,000 per year for every employee.¹⁰⁷

Federal payroll taxes imposed or withheld between February 15, 2020 and June 30, 2020 are not included in PPP payroll costs.¹⁰⁸

b. Amount of Loan

The calculation of a PPP loan amount will differ depending on whether a borrower was in business during the period between February 15, 2019, and June 30, 2019, whether the borrower is a seasonal employer, and whether the borrower is a self-employed individual who filed (or will file) a 2019 Form 1040 Schedule C.

(i) Borrowers in Business Between February 15, 2019, and June 30, 2019

For borrowers that were in business between February 15, 2019, and June 30, 2019, the PPP loan will be calculated using the following steps.¹⁰⁹

Step One: Take the borrower's total payroll costs (as defined above) from the previous twelve months and subtract any compensation paid to any employee that was in excess of 100,000 dollars per year. For borrowers who are independent contractors, sole proprietors, or self-employed, any amounts paid in excess of 100,000 dollars per year per borrower should also be subtracted from the total payroll costs.

Step Two: Calculate the borrower's average monthly payroll costs by dividing the result of Step One by twelve.

Step Three: Multiply the result of Step Two by 2.5.

Step Four: If the borrower also received an Economic Injury Disaster Loan (see below) between January 31, 2020, and April 3, 2020, add the outstanding amount of that balance to the result of Step Three. For this purpose, the outstanding balance does not include the amount of an "advance" made under the COVID-19 EIDL program, because that amount will not need to be repaid.

¹⁰⁷ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812-20813 (April 15, 2020); Initial PPP Interim Final Rule, at 8, 11 (April 2, 2020).

¹⁰⁸ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 11 (April 2, 2020). This includes income taxes that are required to be withheld from employees.

¹⁰⁹ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 8-9 (April 2, 2020). For examples of how PPP loans are calculated, see First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812-20813 (April 15, 2020); see also PPP Interim Rule, at 9-10.

(ii) Borrowers Not in Business Between February 15, 2019 and June 30, 2019

For startups that were not in business between February 15, 2019 and June 30, 2019, it appears that the PPP loan will be calculated based on the borrower's average monthly payroll costs (as defined above) from the period beginning January 1, 2020 through February 29, 2020.¹¹⁰ That average monthly cost is then multiplied by 2.5 to get the PPP loan amount.

(iii) Seasonal Employers

For seasonal employers, the PPP loan amount is calculated by taking the following steps.¹¹¹

Step One: Determine the seasonal employer's average monthly payroll costs (as defined above) for either the twelve-week period beginning February 15, 2019, or the period between March 1, 2019, and June 30, 2019. The seasonal employer may decide which period to use.

Step Two: Multiply the result of Step One by 2.5.

(iv) Self-Employed Borrowers, Without Employees, Who File a Schedule C or Schedule F

For self-employed applicants without employees, PPP rules rely on a Schedule C to do the following loan calculation.¹¹² As noted above, Treasury Department guidance from April 24, 2020, states that farmers are allowed to use a Schedule F in place of Schedule C, and therefore the Schedule F can be used to perform a similar calculation as the one below.¹¹³

Step One: Take the net profit amount from line 31 of the 2019 Form 1040 Schedule C, or the net farm profit amount from line 34 of Form 1040 Schedule F. If this amount is greater than \$100,000, reduce that amount to \$100,000. If the amount is zero or less, you are not eligible for a PPP loan. In other words, SBA rules say that if a self-employed applicant, with no employees, did not have positive income in 2019, that applicant will not be eligible for PPP.

¹¹⁰ CARES Act § 1102(a)(2). This provision was not included in the Federal Register or the Initial PPP Interim Final Rule. It is also not clear from the CARES Act whether outstanding EIDL loans should be included.

¹¹¹ CARES Act § 1102(a)(2).

¹¹² Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020); Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 1 (April 24, 2020).

¹¹³ Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Questions 1, 3 (April 24, 2020).

This rule is very important to farmers, because many farmers report negative income on their Schedule F.

Step Two: Calculate the average monthly net profit amount by taking the result of Step One and dividing it by twelve.

Step Three: Multiply the result of Step Two by 2.5.

Step Four: If the borrower also received an Economic Injury Disaster Loan (see below) between January 31, 2020, and April 3, 2020, add the outstanding amount of that balance to the result of Step Three. For this purpose, the outstanding balance does not include the amount of an "advance" made under the COVID-19 EIDL program, because that amount will not need to be repaid.

(v) Self-Employed Borrowers, With Employees, Who File a Schedule C or Schedule F

For self-employed applicants with employees, PPP rules rely on a Schedule C to do the following loan calculation.¹¹⁴ As noted above, Treasury Department guidance states that farmers are allowed to use a Schedule F in place of Schedule C, and therefore the Schedule F can be used to perform a similar calculation as the one below.¹¹⁵

Step One: Determine the 2019 payroll by adding together: (1) the net profit amount from line 31 of Schedule C, or the net farm profit amount from line 34 of Form 1040 Schedule F. This amount should be reduced to \$100,000 if greater than that, and set to zero if less than zero; (2) the 2019 gross wages and tips paid to employees; and (3) any 2019 employer health contributions, retirement contributions, and state or local taxes assessed on employee compensation.¹¹⁶ If you have not filed a 2019 Schedule C (or presumably a Schedule F), you should still fill one out in order to compute the net profit amounts.¹¹⁷

Step Two: Calculate the average monthly amount by taking the result of Step One and dividing it by twelve.

Step Three: Multiply the result of Step Two by 2.5.

Step Four: If the borrower also received an Economic Injury Disaster Loan (see below) between January 31, 2020, and April 3,

¹¹⁴ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020); Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 2 (April 24, 2020).

¹¹⁵ Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Questions 2-3 (April 24, 2020).

¹¹⁶ More detailed guidance on how to compute the 2019 payroll can be found in the Federal Register. See Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020).

¹¹⁷ Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 2 (April 24, 2020).

2020, add the outstanding amount of that balance to the result of Step Three. For this purpose, the outstanding balance does not include the amount of an "advance" made under the COVID-19 EIDL program, because that amount will not need to be repaid.

(vi) Others—Corporations, Partnerships, Nonprofits, and Tribal Businesses

Specific rules also apply for the way PPP loan amounts are calculated for corporations, partnerships, nonprofits, and tribal businesses.¹¹⁸

c. Cost of the PPP

The cost of PPP loans is covered by the federal government.¹¹⁹ Lenders receive payment from the federal government for making the loans.

d. Additional Terms

There are few additional terms for a PPP loan. No personal guarantees are required, and no collateral is required.¹²⁰ There are no upfront guarantee fees payable by the borrower, nor any lender service fees. Agents who assist borrowers with applications may not charge borrowers any fees; instead, the agent must charge the lender.

No eligible borrower may receive more than one PPP loan.¹²¹

The interest rate for a borrower on a PPP loan that is not forgiven is one percent.¹²² Payments do not need to begin for the first six months after the loan is disbursed, and the loan payments may be deferred for up to one year.¹²³

e. Use of PPP Loan Funds

On the PPP application form, borrowers must certify that the current economic uncertainty makes the loan necessary to support ongoing operations and that the loan proceeds will be used to retain workers and maintain payroll or make mortgage, rent, and utility payments.¹²⁴

¹¹⁸ See, for example, Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Questions 4, 5, 7 (April 24, 2020).

¹¹⁹ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20816 (April 15, 2020); Initial PPP Interim Final Rule, at 25-26 (April 2, 2020).

¹²⁰ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20816 (April 15, 2020); Initial PPP Interim Final Rule, at 25 (April 2, 2020).

¹²¹ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 12 (April 2, 2020). The CARES Act does not include this requirement.

¹²² First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20816 (April 15, 2020); Initial PPP Interim Final Rule, at 25 (April 2, 2020).

¹²³ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 13 (April 2, 2020).

¹²⁴ PPP Borrower Application Form at 2; see also Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 31 (April 26, 2020).

The specific rules for the allowable uses of PPP funds are confusing because of the multiple Federal Register guidelines that have been published in piecemeal fashion. It appears that the First Official PPP Interim Final Rule provides the rules that will apply to most PPP borrowers.¹²⁵ The Self-Employed PPP Interim Final Rule, however, outlines the rules for self-employed individuals who filed (or will file) a 2019 Form 1040 Schedule C.¹²⁶ As noted above, farmers should be able to use Schedule F in place of Schedule C, but they will likely need to follow all other aspects of the Self-Employed PPP Interim Final Rule.

According to the First Official PPP Interim Final Rule, PPP loan funds can only be used for the following purposes: (1) payroll costs; (2) cost of continuing health care benefits; (3) employee salaries, commissions or similar compensation; (4) payment of interest on a mortgage (but not mortgage principal or prepayment); (5) rent; (6) utilities; and (7) interest on other debts that were incurred before February 15, 2020.¹²⁷ It is also possible to use a PPP loan to refinance an SBA Economic Injury Disaster Loan (EIDL), discussed below, that was made between January 31, 2020, and April 3, 2020. SBA will seek repayment of funds used in an unauthorized way.¹²⁸ If done knowingly, there could be additional liability and criminal charges.¹²⁹

For self-employed individuals who filed, or will file, a 2019 Form 1040 Schedule C—and likely a Schedule F—SBA is limiting the use of PPP loan proceeds to the types of allowable uses for which the individual made expenditures in 2019.¹³⁰ In other words, the only allowable uses of PPP funds will be for those expenses reflected on the 2019 Form 1040 Schedule C and, likely, Schedule F. Any expenses incurred between January 1, 2020 and February 14, 2020 will not be allowable uses of PPP funds. SBA says this policy exists because expenses incurred in 2020 by such self-employed individuals lack verifiable documentation. SBA says that it will issue additional guidance for self-employed individuals who were not in operation in 2019 but were operating as of February 15, 2020 and plan to file a 2020 Form 1040 Schedule C or, likely, a Schedule F.¹³¹

For those self-employed individuals with a 2019 Form 1040 Schedule C—and likely a Schedule F—PPP loan funds are to be used for the following purposes: (1) owner compensation replacement; (2) employee payroll costs for employees whose principal place of residence is in the United States (if the self-employed individual has employees);¹³² (3) payment of interest on a business mortgage obligation for real or personal property (but not mortgage principal or prepayment); (4) business rent payments; (5) business utility payments; (6) refinancing an SBA EIDL loan, discussed below, made between January 31, 2020,

¹²⁵ See First Official PPP Interim Final Rule, 85 Fed. Reg. 20811 (April 15, 2020); see also Initial PPP Interim Final Rule (April 2, 2020).

¹²⁶ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747 (April 15, 2020).

¹²⁷ CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 15 (April 2, 2020).

¹²⁸ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20814 (April 15, 2020); Initial PPP Interim Final Rule, at 17 (April 2, 2020).

¹²⁹ PPP Borrower Application Form, page 2.

¹³⁰ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020).

¹³¹ Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 15, 2020).

¹³² Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020).

and April 3, 2020;¹³³ and (7) interest on other debts that were incurred before February 15, 2020, though such amounts are not eligible for PPP loan forgiveness.¹³⁴ In other words, this final rule means that although PPP loan proceeds can also be used to pay interest on other debts that were incurred before February 15, 2020, such amounts are not eligible for the loan forgiveness.

f. Forgiveness and Potential Repayment

The principle and any interest on a PPP loan can be forgiven.¹³⁵ In general, to have the loan forgiven, the money must be spent on qualifying payroll costs, interest, rent, covered mortgage obligations, and utilities over the first eight weeks after the loan is disbursed.¹³⁶ Lenders are required to make the first PPP loan disbursement no later than ten calendar days from the date the loan was approved.¹³⁷ In other words, borrowers do not have the option of delaying when the eight-week period begins so as to capture more payroll costs.

According to SBA, no more than 25 percent of the forgiven amount may be for non-payroll costs.¹³⁸ So, if the business borrows 10,000 dollars, to have the whole loan forgiven at least 7,500 dollars of the loan would need to go to payroll expenses. Documentation of these expenses will be required when requesting loan forgiveness.¹³⁹

¹³³ If a self-employed individual received an EIDL loan which is not used for payroll costs, the EIDL loan will not affect eligibility for PPP. However, if the EIDL loan is used for payroll costs, the PPP loan must be used to refinance the EIDL loan. In addition, proceeds from any EIDL emergency advance, as discussed below, will be deducted from the loan forgiveness amount on the PPP loan. Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020).

¹³⁴ For self-employed individuals with employees, eligible payroll costs have the same definition as that for any other eligible entity, and follow the rules as stated in the Initial PPP Interim Final Rule. This means that eligible payroll costs include the cost of continuing health care benefits as well as employee salaries, commissions or similar compensation; See Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 10 (April 2, 2020).

¹³⁵ CARES Act § 1106; Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 13 (April 2, 2020).

¹³⁶ CARES Act § 1106(a)-(b); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 15, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813-20814 (April 15, 2020); Initial PPP Interim Final Rule, at 13-14 (April 2, 2020). See also Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 20 (April 26, 2020). For self-employed individuals who filed (or will file) a 2019 Form 1040 Schedule C, there are additional rules for what is eligible for PPP loan forgiveness. See Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 15, 2020).

¹³⁷ Treasury Department, Paycheck Protection Program Frequently Asked Questions (FAQs), Question 20 (April 26, 2020).

¹³⁸ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813-20814 (April 15, 2020); Initial PPP Interim Final Rule, at 13-14 (April 2, 2020). Although the CARES Act allows for forgiveness of the total amount of payroll costs and non-payroll costs, SBA made the decision to cap non-payroll costs at 25 percent. Compare CARES Act § 1106(b) with First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813-20814 (April 15, 2020) and Initial PPP Interim Final Rule, at 14 (April 2, 2020).

¹³⁹ CARES Act § 1106(e); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 15, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20814 (April 15, 2020); Initial PPP Interim Final Rule, at 16 (April 2, 2020); PPP Borrower Application Form, page 2. For self-employed

In order to receive full loan forgiveness, the borrower must keep the same number of full-time staff (or their equivalents), and keep the level of payroll wages within 75 percent of what it was in the most recent quarter.¹⁴⁰ Any employment or salary changes made between February 15, 2020, and April 26, 2020, must be reversed by June 30, 2020.¹⁴¹ This means that full-time employment equivalents and salary levels must not be reduced during the eight-week period following when the loan is received. If the borrower does not comply with these requirements, the amount of the loan forgiveness will be reduced.¹⁴²

The Self-Employed PPP Interim Final Rule clarifies that for self-employed individuals who filed (or will file) a 2019 Schedule C, SBA is limiting PPP loan forgiveness to a proportionate eight-week share of 2019 net profits.¹⁴³ This likely applies to Schedule F profits as well. SBA's rationale is that many self-employed individuals have few overhead expenses that qualify for forgiveness under the Act, because many of them operate out of their homes, vehicles, or sheds, and do not incur qualifying mortgage interest, rent, or utility payments. Given this rationale, and because—as is noted above—farmers should be able to use Schedule F in place of Schedule C, it could be that SBA will limit the PPP loan forgiveness for a self-employed farmer who files a Schedule F in a similar manner. That would mean that if the Schedule F shows no profit, the farmer will not be eligible for a PPP loan.

If the PPP loan is forgiven, the forgiven loan will not be subject to federal income tax.¹⁴⁴ Usually when a debt is forgiven, it will be considered taxable income, but not for PPP loan forgiveness.

If not forgiven, PPP loans are due in two years.¹⁴⁵ Payments on loans are deferred for six months, although one percent interest will accrue in that period.¹⁴⁶

SBA will issue more rules about forgiveness of PPP loans.¹⁴⁷

individuals who filed (or will file) a 2019 Form 1040 Schedule C, and who have employees, Form 941 should also be submitted along with payroll processor records for those employees. See Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 15, 2020).

¹⁴⁰ CARES Act § 1106(d)(3)(A).

¹⁴¹ CARES Act § 1106(d)(5); Paycheck Protection Program (PPP) Information Sheet: Borrowers, at 3.

¹⁴² CARES Act § 1106(d).

¹⁴³ See Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 15, 2020).

¹⁴⁴ CARES Act § 1106(i).

¹⁴⁵ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 12 (April 2, 2020). The CARES Act provides for a loan maturity of up to ten years, but SBA has determined that two years is sufficient. Compare CARES Act § 1102(a)(2) with Initial PPP Interim Final Rule, at 12 (April 2, 2020).

¹⁴⁶ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 13 (April 2, 2020). The CARES Act provides that loans should be deferred for not less than six months, but no more than one year; SBA, however, has determined that a six-month deferment is appropriate. Compare CARES Act § 1102(a)(2) with Initial PPP Interim Final Rule, at 13 (April 2, 2020).

¹⁴⁷ First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 14 (April 2, 2020).

C. Economic Injury Disaster Loan (EIDL) Program

The CARES Act makes additional money available through what is known as the COVID-19 Economic Injury Disaster Loan (“EIDL”) program.¹⁴⁸ This program is run by the Small Business Administration (SBA), and under the CARES Act and the Enhancement Act the EIDL program has been modified and expanded to address the COVID-19 crisis.¹⁴⁹

The COVID-19 EIDL program does two things. First, it offers EIDL business loans to eligible entities. Some requirements SBA usually has for an EIDL are relaxed. Second, an eligible business that applies for a COVID-19 EIDL program loan can also receive an advance on that loan of up to 10,000 dollars that the business will not need to repay. These advances are known as both “EIDL Emergency Advances” and “Emergency EIDL Grants.”¹⁵⁰

SBA has released very little in the way of rules for how the COVID-19 EIDL program will work. In some respects, the rules will follow SBA’s usual EIDL rules. In other respects, the rules have been changed for the COVID-19 crisis. Although originally, under the CARES Act, it did not appear that most farms were eligible for the COVID-19 EIDL program, the Enhancement Act expressly makes agricultural enterprises eligible for COVID-19 EIDL assistance.¹⁵¹ These changes are discussed in more detail below.

1. Funding for EIDL—Recently Increased

The CARES Act originally appropriated 562 million dollars to the COVID-19 EIDL program and ten billion dollars towards EIDL Emergency Advances.¹⁵² That funding, however, ran out by mid-April 2020.¹⁵³ Additional funding was appropriated on April 24, 2020, when the Enhancement Act became law. Among other things, the Enhancement Act allocates an additional fifty billion dollars in funding for the COVID-19 EIDL program, and an additional ten billion dollars in funding for EIDL Emergency Advances.¹⁵⁴

¹⁴⁸ CARES Act, Division A, Title I, Section 1110. The EIDL program becomes part of what is known as SBA’s 7(b) Disaster Assistance Program, found at 15 U.S.C. § 636(b)(2).

¹⁴⁹ CARES Act § 1110; Enhancement Act, § 101(b) (April 24, 2020).

¹⁵⁰ See CARES Act § 1110; see also Small Business Association, Economic Injury Disaster Loan Emergency Advance page, at: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loan-emergency-advance>.

¹⁵¹ Enhancement Act, Division A—Small Business Programs, § 101(a)(c) (April 24, 2020).

¹⁵² CARES Act § 1110(d)(7); CARES Act, Division B—Emergency Appropriations for Coronavirus Health Response and Agency Operations, Title V, Independent Agencies, Small Business Administration, Disaster Loans Program Amount.

¹⁵³ See Mark Niquette and Jennifer Jacobs, Small Business Relief Funds Drained Fast With Many Shut Out (April 16, 2020), at: <https://www.bloomberg.com/news/articles/2020-04-16/virus-rescue-program-for-small-business-runs-out-of-money>. The SBA website also explained that they were unable to accept applications for EIDL due to a lapse in appropriations. See SBA, Economic Injury Disaster Loans Emergency Assistance (April 26, 2020), at: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loan-emergency-advance>.

¹⁵⁴ Enhancement Act, § 101(b); Division B—Additional Emergency Appropriations for Coronavirus Response, Title II, Independent Agencies, Small Business Association, Disaster Loan Program Account (April 24, 2020).

2. EIDL Application and Application Deadline

Applications for the COVID-19 EIDL program loans, as well as the EIDL Emergency Advances, are made directly through SBA.¹⁵⁵ SBA stopped accepting new EIDL applications when the original CARES Act funding ran out.¹⁵⁶ It is unclear when SBA will resume taking EIDL applications now that additional funding has been approved under the Enhancement Act.

The deadline to apply for COVID-19 EIDL assistance is December 31, 2020.¹⁵⁷

3. COVID-19 EIDL Available to Businesses—and Now to Agricultural Enterprises

COVID-19 EIDL program loans are available to a wide variety of businesses that have suffered substantial economic injury.¹⁵⁸ A central question for EIDL assistance under the CARES Act has been its availability for farmers. As originally administered following the passing of the CARES Act, it appeared that SBA believed most farms were not eligible for EIDL assistance, with the exception of small agricultural cooperatives, producer cooperatives, small aquaculture enterprises, and small nurseries.¹⁵⁹

Changes made by the Enhancement Act now require SBA to make agricultural enterprises with 500 or fewer employees eligible for COVID-19 EIDL program loans.¹⁶⁰ "Agricultural enterprises" include "small business concerns engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural-related industries."¹⁶¹

¹⁵⁵ The COVID-19 EIDL program applications are available on SBA's website, at: <https://www.sba.gov/page/disaster-loan-applications>. For the PPP program, applications go through a lender or other institution.

¹⁵⁶ The SBA website does say that "Applicants who have already submitted their applications will continue to be processed on a first-come, first-served basis." See SBA, Disaster Loan Applications (April 26, 2020), at <https://www.sba.gov/page/disaster-loan-applications>.

¹⁵⁷ CARES Act § 1110(a)(1); Disaster Declarations of Economic Injury for the Coronavirus (COVID-19); Administrative Declarations of Economic Injury Disasters for the Entire United States and U.S. Territories, Correction, 85 Fed. Reg. 20015, 20016 (April 9, 2020).

¹⁵⁸ CARES Act § 1110(a)-(b).

¹⁵⁹ When administering the COVID-19 EIDL program, SBA appeared to rely on existing rules for the traditional SBA EIDL program loans, known as SBA 7(b) loans, that apply when there is a natural disaster. One such rule states that EIDL "eligible businesses do not include agricultural enterprises," with the exception of small agricultural cooperatives, producer cooperatives, small aquaculture enterprises, and small nurseries. 13 C.F.R. § 123.300(c) (2020). The original COVID-19 EIDL online application also expressly stated that an applicant is not eligible if it is "an agricultural enterprise (e.g. farm)," with the exception of an aquaculture enterprise, an agricultural cooperative, or a nursey. EIDL applicants were required to verify that they were not an agricultural enterprise other than one of those few exceptions. A hard copy of the original application is on file with FLAG.

¹⁶⁰ Enhancement Act, § 101(c)(3). Prior to the passing of the Enhancement Act, and the addition of agricultural enterprises as eligible entities for COVID-19 EIDL assistance, there been an argument that some people who farmed—specifically those with value-added operations—might also qualify for EIDL program loans. That discussion can be found in the April 13, 2020 edition of FLAG's Farmers' Guide to COVID-19 Relief.

¹⁶¹ The Enhancement Act uses the definition of "agricultural enterprise" that is found in section 18(b) of the Small Business Act (15 U.S.C. § 647(b)). Enhancement Act, § 101(c)(3).

Eligible businesses for COVID-19 EIDL assistance include small businesses, tribal small business concerns,¹⁶² employee stock ownership plans (ESOPs), and now, agricultural enterprises, so long as each business has fewer than 500 employees.¹⁶³ In some cases, businesses with more than 500 employees may be eligible for an EIDL program loan.¹⁶⁴ In addition, small business concerns,¹⁶⁵ private nonprofit organizations, and small agricultural cooperatives are also eligible, as are sole proprietorships and independent contractors.¹⁶⁶

To be eligible for a COVID-19 EIDL program loan, the business must have been in operation on January 31, 2020.¹⁶⁷

The maximum COVID-19 EIDL program loan is two million dollars.¹⁶⁸ No personal guarantees are required for loans up to 200,000 dollars that are made between January 31, 2020, and December 31, 2020.¹⁶⁹ No collateral is required for loans up to 25,000 dollars.¹⁷⁰ SBA may approve the loan based solely on a credit score or on other "alternative appropriate methods."¹⁷¹ Tax returns are not required. The loans have a 3.75 percent interest rate for up to thirty years.¹⁷² The interest rate for nonprofits is 2.75 percent.

These relaxed eligibility rules for the COVID-19 EIDL program apply to EIDL program loans made between January 31, 2020, and December 31, 2020.¹⁷³

4. EIDL Emergency Advances

COVID-19 EIDL applicants, which can now include agricultural enterprises, may request that SBA give them an advance on the loan of up to 10,000 dollars.¹⁷⁴ If

¹⁶² For the meaning of "tribal business concerns," the CARES Act cites to the description found in 15 U.S.C. § 657a(b)(2)(C). CARES Act § 1110(a)(2)(E).

¹⁶³ CARES Act § 1110(a)(2); Enhancement Act, § 101(c).

¹⁶⁴ For a very brief description of COVID-19 EIDL eligibility, see SBA, Economic Injury Disaster Loan Emergency Advance, at: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loan-emergency-advance>. SBA size standards for various industries may allow some to businesses have more than 500 employees. See SBA, Table of Size Standards, at: <https://www.sba.gov/document/support--table-size-standards>. Additional size eligibility rules can be found at 13 C.F.R. § 121.201 (2020).

¹⁶⁵ CARES Act §§ 1101(2), 1110(b). The definition of a "small business concern" for purposes of the CARES Act comes from Section 3 of the Small Business Act, which can be found at 15 U.S.C. § 632(a). Although this definition includes various farming, ranching, and other agricultural industries, the Small Business Act expressly excludes "agricultural enterprises" from eligibility for EIDL program loans. See 15 U.S.C. § 636(b)(2). Accordingly, it is unlikely that most farms will be eligible for relief under the CARES Act EIDL provisions.

¹⁶⁶ CARES Act § 1110(a)-(b).

¹⁶⁷ CARES Act § 1110(c)(2).

¹⁶⁸ 15 U.S.C. § 636(B)(8)(A); see also, SBA, SBA Disaster Assistance in Response to the Coronavirus, at: <https://www.sba.gov/disaster-assistance/coronavirus-covid-19>.

¹⁶⁹ CARES Act § 1110(c)(1).

¹⁷⁰ 13 C.F.R. § 123.11(a) (2020).

¹⁷¹ CARES Act § 1110(d).

¹⁷² See SBA, SBA Disaster Assistance in Response to the Coronavirus, at: <https://www.sba.gov/disaster-assistance/coronavirus-covid-19>.

¹⁷³ CARES Act § 1110(a)(1).

¹⁷⁴ CARES Act § 1110(e)(3); Enhancement Act, § 101(c).

approved, the money would arrive within three days.¹⁷⁵ The advance can be used to, among other things: (1) pay sick leave for employees who are unable to work due to COVID-19; (2) maintain payroll; (3) meet increased costs of materials due to COVID-19's impact on the supply chain; (4) make rent or mortgage payments; and (5) pay existing debts.¹⁷⁶ Business are not required to repay this money.¹⁷⁷ This is true even if the business is not ultimately approved for the COVID-19 EIDL program loan.

The COVID-19 EIDL emergency advances will be available until December 31, 2020.¹⁷⁸

D. SBA Appeals

The SBA has an appeals system for decisions made by the agency.¹⁷⁹ The system is fairly narrow to begin with, and only certain kinds of decision can be appealed. It is not clear whether PPP or EIDL will be subject to this appeals system.

¹⁷⁵ CARES Act § 1110(e)(1)-(3).

¹⁷⁶ CARES Act § 1110(e)(4).

¹⁷⁷ CARES Act § 1110(e)(5).

¹⁷⁸ CARES Act § 1110(e)(8).

¹⁷⁹ See 13 C.F.R. part 134 (2020); See also SBA, Office of Hearing and Appeals, at: <https://www.sba.gov/about-sba/oversight-advocacy/office-hearings-appeals>; 13 C.F.R. part 134 (2020). The Small Business Act, which authorizes the SBA, also includes a section on appeals. See 15 § U.S.C 634(i).

Chapter Four: The CARES Act Unemployment Insurance

The CARES Act includes a number of changes to unemployment insurance.¹⁸⁰

In general, unemployment insurance is run by individual states and therefore varies from state to state, although the United States Department of Labor provides some oversight of the programs.¹⁸¹ This will continue to be the case, and those seeking unemployment insurance coverage due to COVID-19 will need to apply through their state's unemployment insurance office.¹⁸²

The CARES Act expands unemployment insurance coverage and provides federal funds for states to implement the changes made under the Act. The Department of Labor will also create rules based on the CARES Act to administer the changes, and they have issued an Unemployment Insurance Program Letter that begins to set out the CARES Act rules for unemployment.¹⁸³

There are many unemployment provisions within the CARES Act.¹⁸⁴ This Chapter focuses primarily on the key rules under the Pandemic Unemployment Assistance (PUA) program.

A. General Changes to Unemployment Insurance

The CARES Act changes unemployment insurance benefits in several ways. First, the federal government will add an extra 600 dollars per week in benefits to those receiving

¹⁸⁰ See generally, CARES Act, Title II, Subtitle A, Section 2101-2116.

¹⁸¹ The federal government provides the funds for COVID-19 unemployment insurance changes. For a short summary of unemployment insurance, see Congressional Research Service, The Fundamentals of Unemployment compensation (February 8, 2019) at <https://crsreports.congress.gov/product/pdf/IF/IF10336>. For a longer version, see Congressional Research Service, Unemployment Insurance: Programs and Benefits (October 18, 2019), at: <https://fas.org/sgp/crs/misc/RL33362.pdf>.

¹⁸² Department of Labor, Where Do I File for Unemployment Insurance, at: <https://www.dol.gov/coronavirus/unemployment-insurance#find-state-unemployment-insurance-contacts>.

¹⁸³ Department of Labor, Unemployment Insurance Program Letter, UL No. 16-20 (April 5, 2020), at: https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_acc.pdf; Department of Labor, Unemployment Insurance Program Letter, UL No. 14-20 (April 2, 2020), at: https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390. An earlier Department of Labor Program Letter addressed unemployment insurance flexibility in light of Covid-19. See Department of Labor, Unemployment Compensation (UC) for Individuals Affected by Coronavirus Disease 2019 (COVID-19), (March 12, 2020), at: https://wdr.doleta.gov/directives/corr_doc.cfm?docn=8893. Another Letter addressed changes required by the Families First Coronavirus Response Act, Pub. L. 116-127 (March 18, 2020). See Department of Labor, Families First Coronavirus Response Act, Division D Emergency Unemployment Insurance Stabilization and Access Act of 2020, UL No. 13-20 (March 22, 2020), at: https://wdr.doleta.gov/directives/corr_doc.cfm?docn=8634.

¹⁸⁴ See generally, CARES Act, Title II, Subtitle A, Section 2101-2116.

unemployment.¹⁸⁵ Second, the CARES Act effectively increases the number of weeks that a person may receive unemployment to thirty-nine weeks.¹⁸⁶

B. Farmers and Self-Employed Unemployment Assistance

Under a new temporary program called the Pandemic Unemployment Assistance (PUA) program, the CARES Act expands unemployment coverage to include people who would not normally be eligible for unemployment benefits under state law.¹⁸⁷ This includes people who are self-employed, those seeking part-time employment, and those who do not have sufficient work history to qualify for regular unemployment benefits.¹⁸⁸ PUA benefits last for up to thirty-nine weeks.¹⁸⁹

The possibility of being eligible for unemployment as a self-employed person is of special interest to farmers. The Department of Labor says that PUA will be administered similarly to the already existing Disaster Unemployment Assistance (DUA) program.¹⁹⁰ DUA is available during a disaster and makes that assistance available to those that are self-employed.¹⁹¹ For purposes of DUA, self-employed individuals include farmers.¹⁹² DUA defines a self-employed individual as someone “whose primary reliance for income is on the performance of services in the individual’s own business, or on the individual’s own farm.”¹⁹³ Because PUA is to be administered similarly to DUA, it is reasonable to expect that farmers will be eligible for unemployment under the PUA program as well.

¹⁸⁵ CARES Act § 2104(b)(1); DOL Letter No. 14-20, at 3-4. This is technically known as Federal Pandemic Unemployment Compensation (FPUC). The benefit applies beginning the date after the state enters into an unemployment agreement with the Department of Labor, and an unemployment agreement is entered, and ends no later than July 31, 2020. CARES Act § 2107; DOL Letter No. 14-20, at 4, and Attachment 1; DOL Letter No. 16-20, at 1.

¹⁸⁶ CARES Act §§ 2102(c)(2), 2107; DOL Letter No. 14-20, at 5, and Attachment I; DOL Letter No. 16-20, at 1; DOL Letter No. 17-20, at 2-3 (April 10, 2020), at: https://wdr.doleta.gov/directives/attach/UIPL/UIPL_17-20.pdf. The CARES Act increases the number of weeks that a person would be eligible by 13 weeks—from 26 weeks to 39 weeks. This occurs in two ways. First, the Pandemic Emergency Unemployment Compensation (PEUC) program adds 13 weeks of unemployment for people who have already exhausted their rights to regular unemployment. Second, the Pandemic Unemployment Assistance (PUA) program provides 39 weeks of unemployment.

¹⁸⁷ CARES Act § 2102; DOL Letter No. 16-20, at 1-2.

¹⁸⁸ CARES Act § 2102(a)(3)(A)(ii)(II); DOL Letter No. 14-20, at 3.

¹⁸⁹ CARES Act § 2102(c)(2); DOL Letter No. 16-20, at 3.

¹⁹⁰ DOL Letter No. 14-20, at 3.

¹⁹¹ DUA is described here by the Department of Labor in Disaster Unemployment Assistance (DUA), at: <https://oui.doleta.gov/unemploy/disaster.asp>, and by Federal Emergency management Agency (FEMA) Disaster Unemployment Assistance Fact Sheet, at: <https://www.fema.gov/media-library-data/1528984254955-49515ab3f8eeca0627f71`77a8abe4347a/DisasterUnemploymentAssistance.pdf>.

¹⁹² See 20 C.F.R. § 625.2(n) (2020). In addition, under Department of Labor regulations for DUA, an “unemployed self-employed individual” is eligible for assistance. 20 C.F.R. §§ 625.4(c), 625.5(b) (2020). An unemployed self-employed individual is someone who was unemployed due to the natural disaster. 20 C.F.R. § 625.2(t) (2020). The eligibility of farmers for DUA—based on the rules in effect in 2008—is discussed in FLAG, Farmer’s Guide to Disaster Assistance, Chapter 2 (2008), at: <http://www.flaginc.org/publication/farmers-guide-to-disaster-assistance-sixth-edition/>.

¹⁹³ 20 C.F.R. § 625.2(n) (2020); DOL Letter No. 16-20, at I-3.

C. Rules for Unemployment Assistance under PUA

The CARES Act and the Department of Labor created rules to govern the Pandemic Unemployment Assistance (PUA) program.

In order to be eligible for PUA, an individual, including a self-employed individual, must be ineligible or have exhausted all rights under regular unemployment programs as well as under the CARES Act's Pandemic Emergency Unemployment Compensation (PEUC) program.¹⁹⁴

In addition, the individual must be unemployed, partially unemployed, or unable or unavailable to work for reasons related to COVID-19.¹⁹⁵

Listed below are the conditions under which individuals—including self-employed farmers—can receive PUA. The list comes from the CARES Act, and has some added details and examples provided by the Department of Labor.¹⁹⁶ The Department of Labor says that the examples provided are "illustrative explanations" of circumstances that fall into each category, and "are not an exhaustive list of all COVID-19 related circumstances that may qualify an individual for PUA benefits."¹⁹⁷ States can use other qualifying circumstances, but they must be consistent with the examples below.¹⁹⁸

It is important to note that the CARES Act created a general category, at the bottom of this list, that allows the Department of Labor to determine additional reasons that an individual could be eligible for PUA.¹⁹⁹ This means there is the potential that eligibility for PUA could be expanded by the Department of Labor to include more situations that are directly applicable to farmers.

1. Maybe Has COVID-19

A person is eligible if he or she has been diagnosed with COVID-19 or is experiencing COVID-19 symptoms and is seeking a diagnosis.²⁰⁰ This can also mean that the person has come in direct contact with someone else that has been diagnosed and a qualified medical health professional says the person should quarantine.²⁰¹

2. Household Diagnosis

A person is eligible if a member of that person's household has been diagnosed with COVID-19 or if the person is providing care for a member of the household that has been diagnosed with COVID-19.²⁰²

¹⁹⁴ CARES Act § 2102(a)(3)(A)(i). For the rules of the Pandemic Emergency Unemployment Compensation program, see CARES Act § 2107.

¹⁹⁵ CARES Act § 2102(a)(3)(A)(ii)(I); DOL Letter No. 14-20, at 3.

¹⁹⁶ CARES Act § 2102(a)(3)(A)(ii)(I); DOL Letter No. 16-20, at I-3 to I-6.

¹⁹⁷ DOL Letter No. 16-20, at I-3 to I-4.

¹⁹⁸ DOL Letter No. 16-20, at I-4.

¹⁹⁹ CARES Act § 2102(a)(3)(A)(ii)(I)(kk).

²⁰⁰ CARES Act § 2102(a)(3)(A)(ii)(I)(aa); DOL Letter No. 16-20, at 3.

²⁰¹ DOL Letter No. 16-20, at I-4.

²⁰² CARES Act § 2102(a)(3)(A)(ii)(I)(bb)-(cc); DOL Letter No. 16-20, at 3, I-4.

3. Providing Care for Family Member with COVID-19

A person is eligible if that person is providing care for a family member that has been diagnosed with COVID-19.²⁰³ The care must require enough attention that the person's ability to work is severely limited.

4. Primary Caregiver

A person is eligible if he or she is the primary caregiver for a child or household member that is unable to attend school or another facility that is closed due to COVID-19.²⁰⁴

5. Unable to Reach or Go to Work Due to Quarantine

A person is eligible if he or she is unable to reach work due to a quarantine imposed as a result of COVID-19.²⁰⁵

6. Unable to Reach or Go to Work Due to Self-Quarantine

A person is eligible if he or she is unable to reach work because the person was advised by a medical provider to self-quarantine due to COVID-19.²⁰⁶ This could be true because the person has come into contact with someone else that has tested positive.

It could also be true if the person has a compromised immune system and is therefore advised by a health care provider to self-quarantine in order to avoid greater than average health risks if the person was to become infected.²⁰⁷

7. Become Breadwinner After Death

A person is eligible if that person became the breadwinner or major support for a household because the head of household died from COVID-19.²⁰⁸

8. Place of Employment Closed

A person is eligible if his or her place of employment is closed as a direct result of COVID-19.²⁰⁹

9. Quit Job Due to COVID-19

A person is eligible if he or she had to quit work as a direct result of COVID-19.²¹⁰ This could mean that the person was previously diagnosed with COVID-19, and although the person no longer has the coronavirus, the illness caused health complications that make the person unable to perform essential job functions.

²⁰³ CARES Act § 2102(a)(3)(A)(ii)(I)(cc); DOL Letter No. 16-20, at 3, I-4.

²⁰⁴ CARES Act § 2102(a)(3)(A)(ii)(I)(dd); DOL Letter No. 16-20, at 3, I-4.

²⁰⁵ CARES Act § 2102(a)(3)(A)(ii)(I)(ee); DOL Letter No. 16-20, at 3, I-4.

²⁰⁶ CARES Act § 2102(a)(3)(A)(ii)(I)(ee)-(ff); DOL Letter No. 16-20, at 3, I-4.

²⁰⁷ DOL Letter No. 16-20, at I-5.

²⁰⁸ CARES Act § 2102(a)(3)(A)(ii)(I)(hh); DOL Letter No. 16-20, at 3, I-5.

²⁰⁹ CARES Act § 2102(a)(3)(A)(ii)(I)(jj); DOL Letter No. 16-20, at 3, I-6.

²¹⁰ CARES Act § 2102(a)(3)(A)(ii)(I)(ii); DOL Letter No. 16-20, at 3, I-6.

10. Scheduled to Begin Work but Could Not

A person is eligible if he or she was scheduled to begin work, but no longer has a job or cannot reach the job due to COVID-19.²¹¹

11. Additional Criteria—Could Possibly Help Farmers

The CARES Act allows the Department of Labor to create additional reasons that would allow someone to qualify for PUA. The Department of Labor did so on April 5, 2020 and could expand the reasons further.²¹²

The one example so far released says that an independent contractor who has been forced to suspend work activity due to COVID-19 is eligible for PUA.²¹³ The example used by the Department of Labor is an independent contractor that works for a ride-share service that is forced to suspend operations because of COVID-19. This provision could be helpful to farmers when they are forced to suspend their usual farming operations.

While the Department of Labor has not said directly that farmers unable to sell products because of COVID-19 are eligible for PUA, there are a few situations farmers might face that are similar to the example used by the Department of Labor for independent contractors. For example, if a farmer usually sells at a farmers market, and the farmers market is shut down due to COVID-19, the farmer does not have a place of employment that has been closed, but the farmer has been forced to suspend work activities.²¹⁴ It also might be possible to assist dairy farmers when a milk processor refuses to accept milk from the dairy due to COVID-19. In such a situation, the farmer is then forced to dump milk and has been forced by COV-19 to suspend work activity. It might similarly apply to farmers who previously sold to institutions, such as schools, that are no longer accepting the farmers' production and there are no alternative markets available.

²¹¹ CARES Act § 2102(a)(3)(A)(ii)(I)(gg); DOL Letter No. 16-20, at 3, I-5.

²¹² CARES Act § 2102(a)(3)(A)(ii)(I)(kk); DOL Letter No. 16-20, at I-6.

²¹³ DOL Letter No. 16-20, at I-6.

²¹⁴ The DOL Letter discussing this reason for eligibility says that the work must have been suspended as a direct result of the COVID-19 emergency, such as if a declaration or order restricting movement makes continued operations not sustainable. DOL Letter 16-20, at I-6, I-7. General rules regarding the meaning of "direct result" are at 20 C.F.R. 625.5(c) (2020). The letter also says that states should take into account the "specific circumstance unique to the COVID-19 public emergency." For example, when a business shuts down due to an emergency declaration or social distancing protocols, that would be a direct result of COVID-19.

Chapter Five: The CARES Act Foreclosure Moratorium and Forbearance

The CARES Act includes two protections for borrowers with residential loans: (1) a moratorium on foreclosures; and (2) the right for a borrower to request forbearance on loans. These are powerful protections.²¹⁵ As of now, however, it looks like they will not be available for most farm mortgages—even if there is a home on the land that is mortgaged.

This Chapter explains which home mortgage loans the CARES Act applies to, provides details on forbearance and the foreclosure moratorium, and then discusses the question of whether these protections are available to farmers.

A. Only Federally Backed Mortgage Loans Protected by the CARES Act

The CARES Act protects only certain types of loans. The loans must be federally backed, and the loans must be secured by residential real property.

1. Federally Backed Mortgage Loan

To receive foreclosure and forbearance protections under the CARES Act, the mortgage loan must be federally backed. The definition of a federally backed mortgage loan is included in the CARES Act.²¹⁶ In general, to be a federally backed mortgage, the loan must either be made, insured, or guaranteed by the government, or the loan must be made and then purchased or securitized by Fannie Mae or Freddy Mac.

Under the CARES Act, eligible federally backed mortgage loans include those that are: (1) insured by the Federal Housing Administration (FHA) or the National Housing Act;²¹⁷ (2) guaranteed or insured by the Department of Veterans Affairs;²¹⁸ (3) guaranteed under the Housing and Community Development Act;²¹⁹ or (4) made, guaranteed, or insured by the Department of Agriculture.²²⁰

²¹⁵ An excellent summary of how the mortgage protection in the CARES Act works is the Consumer Financial Protection Bureau, Guide to Coronavirus Mortgage Relief Options (April 6, 2020), at: <https://www.consumerfinance.gov/about-us/blog/guide-coronavirus-mortgage-relief-options/>.

²¹⁶ CARES Act § 4022(a)(2).

²¹⁷ Only FHA insured loans that are made under Title II of the National Housing Act are eligible under the CARES Act. See CARES Act § 4022(a)(2)(A); see also 12 U.S.C. § 1707 et seq. In addition, only loans insured under Section 255 of the National Housing Act qualify for this CARES Act provision. Section 255 mortgages are also known as home equity conversion mortgages, and they are generally available only to homeowners over age 62. See CARES Act § 4022(a)(2)(B); see also 12 U.S.C. § 1715z-20.

²¹⁸ CARES Act § 4022(a)(2)(D).

²¹⁹ The only eligible loans under the Housing and Community Development Act include those guaranteed under sections 184 (loans guaranteed for Indian Housing) or 184A (loans guaranteed for Native Hawaiian housing). See CARES Act § 4022(a)(2)(C); see also 12 U.S.C. §§ 1715z-13a, 1715z-13b.

²²⁰ CARES Act § 4022(a)(2)(E)-(F).

A federally backed loan can also mean that the loan was made and then purchased or securitized by what are commonly known as Fannie Mae or Freddie Mac.²²¹ Nearly half of the mortgages in the country are backed by either Fannie Mae or Freddie Mac.²²²

There are ways to find out if a loan is federally backed. The first step is to call the people who service the loan.²²³ According to the federal Consumer Financial Protection Bureau, the servicer has an obligation to help you to find out who holds or backs your mortgage. It is possible to check about Fannie Mae or Freddie Mac loans online.

2. Secured by Lien on Residential Real Property

In addition to being federally backed, in order to qualify for relief under the CARES Act, a loan must be secured by a lien on residential real property.²²⁴ The residential real property must be designed principally for the occupancy of one to four families.

B. Forbearance and Foreclosure Moratorium

Both forbearance and a moratorium on foreclosure are available under the CARES Act to eligible borrowers.

1. Forbearance

Forbearance is available for borrowers of eligible residential mortgage loans, as described above.²²⁵ During forbearance, the borrower does not need to make payments on the loan. To qualify, the borrower must be experiencing financial hardship due to the COVID-19 emergency. The financial hardship can be directly or indirectly caused by the emergency. Both delinquent and non-delinquent loans can be eligible.

The borrower must request forbearance.²²⁶ The borrower does this by sending a request to whoever is servicing the loan. The borrower must tell the servicer that the borrower is experiencing financial hardship.

Forbearance can last up to 180 days.²²⁷ It may then be extended for another 180 days if the borrower asks that it be extended. Interest will continue to accumulate, but there will be no extra fees or penalties charged to the borrower.²²⁸

2. Foreclosure Moratorium

The foreclosure moratorium means that for eligible borrowers the lender may not start a foreclosure process for the loan, ask a court for a foreclosure judgment or for an

²²¹ CARES Act § 4022(a)(2)(G). The official name for Fannie Mae is the Federal National Mortgage Association, and the official name for Freddie Mac is the Federal Home Loan Mortgage Corporation.

²²² See Consumer Financial Protection Bureau, Guide to Coronavirus Mortgage Relief Options (April 6, 2020), at: <https://www.consumerfinance.gov/about-us/blog/guide-coronavirus-mortgage-relief-options/>.

²²³ A website for the Consumer Financial Protection Bureau provides links to the relevant federal agencies and entities. See Consumer Financial Protection Bureau, Guide to Coronavirus Mortgage Relief Options (April 6, 2020), at: <https://www.consumerfinance.gov/about-us/blog/guide-coronavirus-mortgage-relief-options/>.

²²⁴ CARES Act § 4022(a)(2). The lien can either be a first lien or a subordinate lien.

²²⁵ CARES Act § 4022(b)-(c).

²²⁶ CARES Act § 4022(b)(1).

²²⁷ CARES Act § 4022(b)(2).

²²⁸ CARES Act § 4022(b)(3).

order to sell the property, or execute a foreclosure-related eviction or foreclosure sale.²²⁹ The moratorium applies for not less than a sixty days beginning on March 18, 2020.

C. Farms, Mortgage Forbearance, the Foreclosure Moratorium

If a farm has a mortgage that only covers a residence—and not a large part of the farmland—that mortgage could be eligible for the CARES Act mortgage forbearance and foreclosure moratorium. The same rules described above would apply to that mortgage just as they would to any other residential mortgage.

A different question is whether the CARES Act protects home mortgages if the mortgage also covers a significant piece of farmland. As it stands right now, it looks as if federally backed mortgages on farm homes are not protected under the CARES Act the way every other federally backed residential mortgage is protected.

As noted above, the CARES Act protects loans that are secured by a lien on residential real property.²³⁰ The residential real property must be designed principally for the occupancy of one to four families. It appears that government officials believe that means the lien must be on property that is principally used as a residence. If that is the way the term is understood, most loans that have a farm home as security will not be covered.

The CARES Act arguably could be read to cover liens on properties that include a residence designed for one to four families. Under this understanding, a loan would need to include a lien on the residence, but if the property covered by the lien included both a residence and other significant acreage—such as farmland—the CARES Act would still apply to the loan. Ironically, if a farmer had an FSA Guaranteed Farm Ownership loan for farmland that included a home, that home would appear not to be eligible under the CARES Act; but, if a neighbor to that farm had a USDA Rural Development Rural Housing Loan, that home would be protected.²³¹

As they are currently understood, the forbearance and foreclosure moratorium provisions under the CARES Act do not assist many farmers. Congress could change this. First, at present there is no forbearance or foreclosure moratorium for guaranteed FSA Farm Ownership loans that include a home on the mortgaged property. In addition, although there is currently a halt on FSA direct loan foreclosures, there is no automatic forbearance possibility for those borrowers. Congress could easily change the CARES Act to include FSA loans secured by real estate that serves as a home.

Second, Congress could assist more farmers if it changed the CARES Act to say that loans backed by Farmer Mac counted as federally backed loans for purposes of the Act.²³² This would benefit many farmers.

²²⁹ CARES Act § 4022(c)(2).

²³⁰ CARES Act § 4022(a)(2). The lien can either be a first lien or a subordinate lien.

²³¹ Although the CARES Act does not state which types of loans made, insured, or guaranteed by USDA should be eligible, USDA believes the CARES Act applies only to Rural Housing Loans. See USDA Rural Development COVID-19 Resources (April 7, 2020), at: https://www.rd.usda.gov/files/USDA_RD_SA_COVID19_ProgramImmediateActions.pdf.

²³² Farmer Mac is the Federal Agricultural Mortgage Corporation. See 12 U.S.C. §§ 2279aa to 2279cc. It is regulated by the Farm Credit Administration. See Farm Credit Administration, About Farmer Mac (2020), at: <https://www.fca.gov/farmer-mac-oversight/about-farmer-mac>.

Chapter Six: The CARES Act Agricultural Provisions

The CARES Act devoted significant resources to agriculture.²³³ Although most of the details of how that money will be spent remain unknown, some information has now been provided by the United States Department of Agriculture (USDA).

A. The CARES Act

The CARES Act did two main things that were designed to help farmers.

First, the CARES Act gave fourteen billion dollars to the Commodity Credit Corporation (CCC).²³⁴ The Act does not say how the money must be spent. The CCC is often used to making payments to farmers under nonrecourse marketing loans, and it was the source of money for the Market Facility Payments and other USDA programs. It is not yet clear how CCC will spend this CARES Act money.

Second, the CARES Act gave USDA 9.5 billion dollars.²³⁵ This is in addition to the fourteen billion dollars that goes to the CCC. USDA must spend this money to “prevent, prepare for, and respond to coronavirus by providing support for agricultural producers impacted by coronavirus.” There are several things to note about this money. First, the 9.5 billion dollars must provide support for agricultural producers.²³⁶ This likely means the money will go to producers themselves. Second, agricultural producers must include: (1) producers of specialty crops; (2) producers that supply local food systems, including farmers markets, restaurants, and schools; and (3) livestock producers, including dairy producers. USDA, in other words, must include all of these producers in the spending of the 9.5 billion dollars. The CARES Act, however, does not say how much money should go to each type of producer, only that it must be used to prevent, prepare for, or respond to the coronavirus.

B. USDA Coronavirus Food Assistance Program (CFAP)

On April 17, 2020, USDA announced how some of CARES Act money will be spent—through a program it is calling the Coronavirus Food Assistance Program (CFAP).²³⁷ USDA plans to launch several programs under CFAP. The following sections describe what we currently know about how the CARES Act funding will be spent under CFAP.

²³³ The CARES Act committed about 24.8 billion to food assistance in total. Much smaller amounts were committed to USDA operational needs, rural development programs, and other programs.

²³⁴ CARES Act, § 11002.

²³⁵ CARES Act, Division B, Title 1.

²³⁶ CARES Act, Division B, Title 1.

²³⁷ Press Release, USDA Announces Coronavirus Food Assistance Program, Release Number 222.20 (April 17, 2020), at <https://www.usda.gov/media/press-releases/2020/04/17/usda-announces-coronavirus-food-assistance-program>.

1. Direct Support for Farmers

Under CFAP, USDA will spend sixteen billion dollars in direct support for farmers.²³⁸ USDA says the support will be based on actual losses for agricultural producers where prices and market supply chains have been affected by COVID-19. In addition, USDA will provide farmers with funds for what USDA is calling “adjustment and marketing costs” that have resulted from lost demand and short-term oversupplies for 2020 that were caused by COVID-19.

Exactly how this direct support will work has yet to be announced. However, USDA hopes to have the checks sent by the end of May.²³⁹ Journalists are reporting that about 19.6 billion dollars is expected to go to the livestock industry, 3.9 billion dollars to row crop producers, and 2.1 billion dollars to specialty crop producers, and 500 million dollars for other crops.²⁴⁰

2. USDA Purchases and Distribution

In addition, under CFAP USDA will purchase about three billion dollars of fresh produce, dairy, and meat.²⁴¹ The food will eventually result in boxes of fresh produce, dairy and meat to food banks, community and faith-based organizations, and other nonprofits. Official details for these efforts are also not yet known. The National Sustainable Agriculture Coalition (NSAC) has reported on some aspects of this program that are still in the planning stages.²⁴²

3. Details Still Unknown

In sum, few details of how CARES Act funds will be spent by USDA are known. USDA eventually will create a set of rules for the CFAP programs.

²³⁸ Press Release, USDA Announces Coronavirus Food Assistance Program, Release Number 222.20 (April 17, 2020), at <https://www.usda.gov/media/press-releases/2020/04/17/usda-announces-coronavirus-food-assistance-program>.

²³⁹ Reuters, U.S. Announces \$19 billion Coronavirus Aid for Farmers, Food busy for Poor (April 17, 2020), at <https://www.nytimes.com/reuters/2020/04/17/us/17reuters-health-coronavirus-trump-farmers.html>.

²⁴⁰ Reuters, U.S. Announces \$19 billion Coronavirus Aid for Farmers, Food busy for Poor (April 17, 2020), at <https://www.nytimes.com/reuters/2020/04/17/us/17reuters-health-coronavirus-trump-farmers.html>. The funding announced is likely for the industry as a whole and not just as direct payments to farmers.

²⁴¹ USDA Farmers to Families Food Box (April 26, 2020), at <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

²⁴² National Sustainable Agriculture Coalition (NSAC) Blog, \$3 billion in Coronavirus Response Funds available to Food Hubs and Distributors to Provide Fresh Food Boxes to Those in Need (April 22, 2020), at: <https://sustainableagriculture.net/blog/3-billion-coronavirus-funds-for-food-hubs/>.

Chapter Seven: The CARES Act Bankruptcy Provisions

The CARES Act changes some of the statutes that govern bankruptcy.²⁴³ Many farmers who go through bankruptcy use Chapter 12 if they hope to continue farming. Chapter 12 is designed for family farmers and is useful in many situations. The CARES Act does not make changes to Chapter 12. It does, however, change Chapter 11 (often used by larger businesses), Chapter 7 (often used to bring the farming operation to a close), and Chapter 13 (often called wage-earner bankruptcy). For most farmers considering bankruptcy, the CARES Act changes will not have an impact on the usefulness of bankruptcy. Farmers thinking about bankruptcy, however, should make sure anyone they work with is aware of the changes made by the Act.

In general, there are two types of bankruptcy changes made in the CARES Act. First, the Act makes it easier for a small business to use Chapter 11 bankruptcy.²⁴⁴ Chapter 11 has often been seen as too difficult and expensive for all but very large farming operations. The practical usefulness of these changes for farmers will be easier to assess in the future.

Second, the CARES Act made short-term changes to bankruptcies in Chapter 7 and Chapter 13.²⁴⁵ These changes allow people in Chapter 7 and Chapter 13 to exclude COVID-19 payments from income for bankruptcy eligibility purposes.²⁴⁶ In addition, the CARES Act makes COVID-19 payments not a part of disposable income for a Chapter 13 plan.²⁴⁷ The CARES Act also allows people in Chapter 13 to amend a confirmed plan and extend the period for the plan.²⁴⁸

²⁴³ For a summary of farm bankruptcies “Chapter 12 Bankruptcy: Family Farm, and Family Fisherman Reorganization, 627-686 in Henry J Sommer et al, *Consumer Bankruptcy Law and Practice*, Volume One (12th ed. 2020).

²⁴⁴ CARES Act § 1113(a)(1) (2020).

²⁴⁵ CARES Act § 1113(a)(1) (2020).

²⁴⁶ CARES Act § 1113(b)(1)(A) (2020).

²⁴⁷ CARES Act § 1113(b)(1)(B) (2020).

²⁴⁸ CARES Act § 1113(b)(1)(C) (2020).

Chapter Eight: Regulatory Guidance for Banks and Other Financial Institutions

Lending by financial institutions is highly regulated by several different government bodies.²⁴⁹ Those regulators recently jointly issued four different statements encouraging lending institutions to respond to the COVID-19 crisis. One statement encourages lenders to work with people that are having trouble paying back loans. A second statement encourages lenders to make small-dollar loans to those that need them. A third supports efforts to assist those with low and moderate incomes and to support small businesses and farms. Fourth, the Farm Credit Administration issued a press release and informational memorandum encouraging lenders to help alleviate stress on borrowers from COVID-19.

Lenders who might be tempted to work with struggling farm borrowers are sometimes nervous that if they work with the farmer by deferring payments, or taking other actions, lending regulators will see this as a financial weakness for the lender. For example, if a lender deferred payment on a farm loan, that might be considered a troubled debt restructuring (TDR) by the regulators. The regulator's statements, as well as statements by the Farm Credit Administration, are mainly suggestive. They may be most useful as a broad effort to convince lenders to take the COVID-19 crisis into account when dealing with struggling farmers.

A. Statement on Loan Modification

On April 7, 2020, regulators of financial institutions released a revised Joint Statement on loan modifications for borrowers affected by COVID-19.²⁵⁰ The Statement says that financial institutions are encouraged to work constructively with borrowers who are, or may be, unable to meet payment obligations because of the effects of COVID-19. The regulators view loan modification programs as a positive action that can mitigate adverse impact on borrowers due to COVID-19. The Statement also says that regulators will not criticize institutions for working with borrowers.

According to the Statement, short-term modifications that the regulators have in mind include payment deferrals, fee waivers, extensions of repayment terms, and other delays in payment. Lender actions must still be prudent and consistent with safe and sound practices, but the regulators consider loan modifications to be in the best interest of institutions, the borrowers, and the economy.

B. Statement on Small-Dollar Loans and Workouts

On March 26, 2020, regulators of financial institutions issued a Joint Statement encouraging financial institutions to offer responsible small-dollar loans to small

²⁴⁹ A summary of how this confusing system works is Congressional Research Service, Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework (March 10, 2020), at: <https://fas.org/sgp/crs/misc/R44918.pdf>.

²⁵⁰ Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, Consumer Financial Protection Bureau, Conference of State Bank Examiners, Interagency Statement on Loan Modification and Reporting for Financial Institutions Working with Customers Affected by Coronavirus (Revised) (April 7, 2020), at: <https://www.fdic.gov/news/news/press/2020/pr20049a.pdf>. An earlier version was released on March 22, 2020.

businesses.²⁵¹ The Statement encourages lenders to offer responsible small-dollar loans to consumers and small businesses. The Statement notes that because of COVID-19 these borrowers may need credit due to cash flow problems, unexpected expenses, or income shortages. Small-dollar loans, according to the Statement, can help borrowers meet these credit needs.

The Statement encourages a variety of loan structures through which to offer small-dollar loans. These include open-end lines of credit,²⁵² closed-end installment loans,²⁵³ single payment loans for those affected by COVID-19, as well as consideration of workout strategies with borrowers.²⁵⁴

Historically, small-dollar loans have been a common source of abuse of consumers and small businesses.²⁵⁵ Farmers should therefore be especially careful to read the terms of such loans.

²⁵¹ Board of Governors of the Federal Reserve System, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, National Credit Union Administration, Office of the Comptroller of the Currency, Joint Statement Encouraging Responsible Small-Dollar Lending in Response to COVID-19 (March 26, 2020), at: <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200326a1.pdf>.

²⁵² Open-ended credit is credit that is not limited to a certain use and time limit, and there is no set timeframe for when the loan must be repaid. As an example, for purposes of the Truth in Lending Act, open-end credit is defined as consumer credit that is provided under a plan that is understood to involve repeated transactions, for which credit is made available up to any limit set by the creditor, and which could incur occasional finance charges from the creditor. See 12 CFR § 1026.2(20) (2020). A line of credit is an example of an open-ended loan.

²⁵³ A closed-end loan is a loan for a particular purpose and a set period of time. At the end of the period of time, the loan must be paid off. The Truth in Lending Act defines close-end credit as any consumer credit other than open-end credit. See 12 CFR § 1026.2(10) (2020). Mortgages and equipment loans are examples of loans that are typically closed end.

²⁵⁴ A workout is generally an informal process where a borrower and lender agree to debt forgiveness and a repayment plan when the borrower cannot repay the debt. A workout can be conducted outside of bankruptcy and prevent a foreclosure. See, for example, National Consumer Law Center, Guide to Surviving Debt, Glossary, "Workout," available at: <https://www.nclc.org/for-consumers/guide-to-surviving-debt.html>. Also, according to Black's Law Dictionary, a workout means the restructuring or refinancing of an overdue loan, and often means reducing or discharging the debt. See Black's Law Dictionary, at 1745 (9th ed. 2009). A workout generally is negotiated by the debtor and creditor and done outside of court.

²⁵⁵ Small-dollar loans have sometimes been used, for example, to charge borrowers extremely high interest rates. See, The PEW Charitable Trusts, Standards Needed for Safe Small Installment Loans From Banks, Credit Unions (Feb. 15, 2018), at <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/02/standards-needed-for-safe-small-installment-loans-from-banks-credit-unions>. For criticism of small-dollar loans, including the risks they pose during the COVID-19 pandemic, see, Center for Responsible Lending, Banks Should Not Read Federal Regulators' COVID-19 Small Dollar Guidance as Permitting Payday or Other High-Cost Loans (April 1, 2020), at: <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-covid19-small-dollar-guidance-onepager-2020.pdf>; see also National Consumer Law Center, Civil Rights and Consumer Groups Condemn "Emergency" Regulatory Guidance that Allows Banks to Make Payday Loans (March 26, 2020), at: <https://www.nclc.org/media-center/civil-rights-and-consumer-groups-condemn-emergency-regulatory-guidance-that-allows-banks-to-make-payday-loans.html>.

C. Statement on Low- and Moderate-Income Customers, Small Businesses and Small Farms

On March 19, 2020, lending regulators issued a Joint Statement encouraging lenders to meet the needs of low- and moderate-income customers, small businesses, and small farms.²⁵⁶ It notes that working with these customers is in the long-term interests of the community and the financial system.

Examples provided in the Statement of actions that are encouraged include waiving late fees, overdraft fees and early withdrawal penalties; making more use of short-term unsecured loans for creditworthy borrowers; and allowing borrowers to skip payments without creating a delinquency for the borrower. The regulators also encourage lenders to ease the terms for new loans for small farms and businesses. The Statement specifically describes how such measures can ease cash flow pressure, improve the ability to service debt, and help borrower's recover. The regulators also say that prudent efforts to modify the terms of new or existing loans for small businesses and small farms will not result in criticism by the regulators.

Finally, the Statement supports activities that assist in the provision of food supplies and services for low- and moderate-income people or communities. This would seem to be particularly relevant for urban and direct marketing farmers.

D. Statements by the Farm Credit Administration

A large number of farmers have loans with the Farm Credit System. On March 17, 2020, the Farm Credit Administration, which regulates the Farm Credit System lenders, issued a press release.²⁵⁷ In it, the Farm Credit Administration urges Farm Credit System lenders to take steps to alleviate stress for borrowers that are affected by COVID-19. The suggestions include extending the terms of loans, restructuring debt, and easing loan documentation or credit-extension terms for new loans.

The Farm Credit Administration also issued an Informational Memorandum, on April 1, 2020, stating that it views loan modification programs as positive actions that can mitigate the short-term economic difficulties arising from COVID-19 which have caused some borrowers to be temporarily unable to meet their loan obligations.²⁵⁸ In particular, the Farm Credit Administration notes that if borrowers were provided payment deferrals, fee waivers, extensions of repayment terms, and other delays in payment that are relatively short, this would not be held against Farm Credit System lenders.

²⁵⁶ Joint Statement, Pandemic Planning: Joint Statement on CRA Consideration for Activities in Response to COVID-19 (March 19, 2020), at: <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-19a.pdf>. CRA here refers to the Community Reinvestment Act. See 12 U.S.C. chapter 30.

²⁵⁷ Farm Credit Administration, FCA Encourages Farm Credit System Institutions to Work with Borrowers Affected by COVID-19 (March 17, 2020), at: <https://www3.fca.gov/news/Lists/News%20Releases/Attachments/606/NR-20-04-03-17-20.pdf>.

²⁵⁸ Farm Credit Administration, Informational Memorandum, Guidance on Reporting Troubled Debt Restructuring for Customers Affected by the National Emergency Declaration for the COVID-19 Outbreak (April 1, 2020), at: <https://www3.fca.gov/readingrm/infomemo/Lists/InformationMemorandums/Attachments/262/GuidanceOnTDRsforCustomersAffectedByCOVID-19.pdf>.

Chapter Nine: USDA Administrative Response

The Farm Service Agency (FSA) of USDA reported its administrative actions in response to COVID-19 in a news release on March 26, 2020.²⁵⁹ The changes announced in the news release affect FSA availability, and suggest some flexibility in servicing direct and guaranteed loans.²⁶⁰ It seems likely that FSA eventually will make the changes official by releasing a Notice or changing a Handbook used by FSA officials. As of now, that has not happened, so it is difficult to know exactly how the changes discussed below will work.

A. FSA Availability

USDA says Farm Service Agency (FSA) county offices are open by phone appointment.²⁶¹ This means that FSA should still be available to help farmers with program sign-up, loan servicing, and other important matters. Employees will still be going to the office but will be trying to work with farmers by phone, email, and through on-line materials “whenever possible.”

B. Receipt for Services

USDA rules say that the agency must provide a Receipt for Service to a farmer if the farmer makes a request of FSA.²⁶² The receipt must explain the request and how FSA responded. In the usual case, FSA does not provide a receipt for service when the communication is by phone. During this time of COVID-19, however, when so much of farmer-FSA interactions are by phone, FSA must provide the receipt for service when that business request is made over the phone.²⁶³

C. Loan Program Processing

FSA says some changes have been made to the loan-making process.²⁶⁴

1. Application Deadlines Extended

The deadline for farmers to complete a farm loan application can be extended.²⁶⁵

²⁵⁹ USDA News Release, FSA makes Changes to Farm Loan, Disaster, Conservation and Safety Net Programs to make it Easier for Customers to Conduct Business (March 26, 2020), at: <https://www.fsa.usda.gov/news-room/news-releases/2020/fsa-makes-changes-to-farm-loan-disaster-conservation-and-safety-net-programs-to-make-it-easier-for-customers-to-conduct-business>.

²⁶⁰ According to USDA, the most current updates on available services in response to COVID-19 can be found at: <https://www.farmers.gov/coronavirus>.

²⁶¹ USDA News Release (March 26, 2020).

²⁶² For example, see USDA, Receipt for Service, at: <https://www.usda.gov/partnerships/receipt-for-service>; see also FSA Form AD-2088, Receipt of Request for Benefit or Service Offered by USDA, at: <https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=34254.wba>.

²⁶³ Farm Service Agency (FSA), Clarifying Receipt for Service (RFS) During COVID-19, Notice AO-1751 (April 13, 2020), at: https://www.fsa.usda.gov/Internet/FSA_Notice/ao_1751.pdf

²⁶⁴ USDA News Release (March 26, 2020).

²⁶⁵ USDA News Release (March 26, 2020); FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at: <https://www.farmers.gov/coronavirus>.

2. Extended Repayment Period

FSA can extend the repayment period of an annual operating loan beyond eighteen months to help borrower through unique periods of financial difficulty.²⁶⁶ Normally, these loans are for twelve months.

3. Price Projections

FSA will continue to use commodity planning prices that have already been approved for the current year.²⁶⁷

4. Lien Searches

When FSA makes a loan, it must do lien searches and other records searches. If the government offices that house these records are closed, and the searches cannot be completed, FSA says it will still prepare loan documents for closing.²⁶⁸ The closing, however, will not occur until the searches are completed.

If FSA can get the lien position it usually seeks for what it calls the primary security on the loan, it will close the loan even if there needs to be additional security, and even if the lien searches, filings, and recordings cannot be completed because of the closing of a government building.²⁶⁹

5. Remote Paperwork

FSA is allowing faxed or scanned signatures as well as virtual notary service, and is using video conferencing for loan closings.²⁷⁰

D. Direct Loan Servicing

The following changes have been made regarding the servicing of existing direct loans.²⁷¹

1. Direct Loan Servicing Deadlines Extended

FSA is extending the deadline for farmers to respond to deadlines for direct loan servicing actions, including loan deferral consideration.²⁷² These deadline extensions also apply to submitting a complete application for loan servicing, accepting an offer

²⁶⁶ FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at: <https://www.farmers.gov/coronavirus>.

²⁶⁷ FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at: <https://www.farmers.gov/coronavirus>.

²⁶⁸ USDA News Release (March 26, 2020); FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at: <https://www.farmers.gov/coronavirus>.

²⁶⁹ USDA News Release (March 26, 2020); FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at: <https://www.farmers.gov/coronavirus>.

²⁷⁰ FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at: <https://www.farmers.gov/coronavirus>.

²⁷¹ USDA News Release (March 26, 2020).

²⁷² USDA News Release (March 26, 2020).

for loan servicing, providing a response to an offer of loan servicing, or requesting homestead protection.²⁷³

2. Accelerations and Some Foreclosures are Suspended

FSA will temporarily stop taking several actions on direct loans. The actions to be suspended include loan accelerations, non-judicial foreclosures, and referring foreclosures to the Justice Department. For foreclosures and evictions that are already in the hands of the Justice Department, the U.S. Attorney's office will decide how to proceed.²⁷⁴

E. Guaranteed Loans

Lenders that have guaranteed farm loans are allowed to self-certify when they give subsequent year operating loan advances on lines of credit.²⁷⁵ This means the bank does not have to check with FSA first. The lender can also self-certify any emergency advancement of funds on lines of credit.

In addition, FSA will consider requests from lenders to allow temporary deferral of loan payments when borrowers do not have a feasible plan reflecting that family living expenses, operating expenses, and debt can be repaid if the lender asks for it.²⁷⁶ FSA will also consider allowing temporary forbearance of loan liquidations and foreclosures if the lender asks for it.

FSA may also allow guaranteed lenders more time to complete an application.²⁷⁷ FSA will be flexible when COVID-19 prevents a loan that would normally be guaranteed from having the guarantee completed. FSA will consider granting the guarantee later.

F. USDA Appeals

The USDA appeals system continues to be in place.²⁷⁸

²⁷³ FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at <https://www.farmers.gov/coronavirus>.

²⁷⁴ FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at <https://www.farmers.gov/coronavirus>. In general, USDA will follow state law for foreclosures. There are considerable differences among states. Although foreclosures go by different names in different places, in general there are: (1) judicial foreclosures; and (2) non-judicial foreclosures, or foreclosures by advertisement. In a judicial foreclosure, the entire process must go through a court. In a non-judicial foreclosure, it does not. Many states have both types of foreclosures. Some states require judicial foreclosures. For a USDA loan foreclosure, the Department of Justice typically carries out a judicial foreclosure. FSA foreclosures, the role of the Justice Department, and the handling of judicial and nonjudicial foreclosures is discussed in FSA Handbook 5-FLP, Direct Loan Servicing—Special and Inventory Property Management, at page 15-4, para. 533.F; page 16-1-16.2, para. 551.A, D; page 16-31, para. 566.D; and pages 16-32 to 16-33, para. 567.A, D (June 4, 2019).

²⁷⁵ USDA News Release (March 26, 2020).

²⁷⁶ USDA News Release (March 26, 2020).

²⁷⁷ FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at <https://www.farmers.gov/coronavirus>.

²⁷⁸ FSA Handbook 1-APP, Program Appeals, Mediation, and Litigation (Revision 2) (Sept. 12, 2016).

Chapter Ten: Federal Crop Insurance and NAP Coverage

The interaction between federal crop insurance and the COVID-19 crisis can be tricky.²⁷⁹ This Chapter focuses on two aspects of COVID-19 and crop insurance: (1) obligations that farmers have agreed to in their crop insurance policies; and (2) policy changes made recently as a result of COVID-19 that affect crop insurance. This Chapter also discusses important considerations for farmers with NAP.

A. Farmers with Crop Insurance: The Policy is Crucial

For the 2020 crop year, if a farmer planned to buy federal crop insurance, that purchase likely has already been made.²⁸⁰ Under federally insured crop insurance, the farmer has a written contract with the crop insurance provider—a company that sells crop insurance—that must be followed if the farmer wants to remain eligible for an indemnity in case of weather or other problems.²⁸¹

The existence of COVID-19, itself, will not create an insurable loss.²⁸² For many farmers, insured losses are those due to unavoidable natural causes. In other words, for many farmers affected by COVID-19, because those losses are not due to lack of rain, insects and plant diseases, or other natural causes, they are not insurable. In some instances, for example if the farmer has a Whole-Farm Revenue Protection policy, there may be coverage that covers a decline in market prices.²⁸³ Even then, however, the policy can be complicated.²⁸⁴

A crop insurance policy is a contract. The farmer is required to follow the policy. Crop insurance policies set what the farmer must do, and the conditions under which the farmer might be able to receive an indemnity. The policy contains rules about the crops to be

²⁷⁹ For a general summary of how crop insurance works, see Congressional Research Service, Federal Crop Insurance: Program Overview for the 115th Congress (May 10, 2018), at: <https://crsreports.congress.gov/product/pdf/R/R45193/4>.

²⁸⁰ For the most basic crop insurance provision, see Federal Crop Insurance Corporation, Common Crop Insurance Policy (Nov. 2019), at: <https://www.rma.usda.gov/-/media/RMAweb/Policies/Basic-Provisions/2020/Basic-Provisions-20-BR.ashx>. Each crop has in addition its own set of policy provisions.

²⁸¹ Crop insurance providers sell the farmer a crop insurance policy, but the policies must be approved by USDA before they can be sold. The primary actors here are the Federal Crop Insurance Corporation (FCIC) and the Risk Management Agency (RMA).

²⁸² See, RMA, COVID-19 Response (April 15, 2020), at: <https://www.rma.usda.gov/News-Room/Frequently-Asked-Questions/COVID-19-Response>.

²⁸³ For the Whole Farm policy see Federal Crop Insurance Corporation, Whole-Farm Revenue Protection Pilot Policy, (Aug. 2019), at: <https://www.rma.usda.gov/-/media/RMAweb/Policies/Whole-Farm-Revenue-Protection/2020/Whole-Farm-Revenue-Protection-Pilot-Policy-20-0076.ashx>. For the regulations that govern Whole Farm see Risk Management Agency, Whole-Farm Revenue Protection Pilot Handbook: 2020 and Succeeding Policy Years ((March 30, 2020), at: <https://www.rma.usda.gov/-/media/RMAweb/Handbooks/Coverage-Plans---18000/Whole-Farm-Revenue-Protection---18160/2020-18160-1h-WFRP-Pilot-Handbook.ashx?la=en>.

²⁸⁴ The question of whether a cause of loss is insurable, for example, can be complicated. Among the issues that could arise in the wake of COVID-19 is whether the inability to market a commodity is covered as an insurable if it is due to quarantine or refusal of a person to accept the commodity, if a purchaser backs out of a contract with a farmer, if the buyer fails to pay the farmer, or if a farmer “abandons” a commodity that is likely not salable. In each of these cases chances are good that the loss is not covered. See Whole-Farm Handbook §§ 91-92 (crop year 2020); Whole-Farm Policy § 21 (crop year 2020).

planted, notice to the insurance provider of a loss, what can and cannot be done with crops that are part of a crop insurance claim, reports that must be made by the farmer, and other requirements that are essential to follow if the farmer is to receive the benefits of crop insurance.

The terms of a crop insurance policy are strict, and do not take into account the possibility of the current COVID-19 crisis. This means that when farmers respond to COVID-19 in ways most people would think are reasonable and responsible, they may accidentally be violating their federal crop insurance policy. For example, a farmer with crop insurance covering a crop that no longer has a market—such as a crop that was to be sold at a farmers market that is now closed, or sold to a school that is no longer in operation—cannot simply shift to a different crop and expect the crop insurance policy to follow. Any change in the planned production must be discussed with, and approved by, the crop insurance provider. It is important to get agreement on such changes in writing or in an e-mail.

B. RMA Changes to Crop Insurance

In response to the COVID-19 pandemic, the Risk Management Agency (RMA) has made several changes that affect crop insurance. Many of these changes have been announced through what RMA calls “Managers Bulletins,” which provide guidance for insurance providers that sell the insurance (known as Approved Insurance Providers, or AIPs), RMA field offices, and others. RMA's website also includes a list of frequently asked questions and answers in order to provide clarity on the changes it is making in response to COVID-19.²⁸⁵ RMA says it will update this list on an ongoing basis.

The first Managers Bulletin encourages the use of remote communications between AIPs and policyholders, and describes changes to crop insurance deadlines under the 2020 Common Crop Insurance Policy, Basic Provisions (BP).²⁸⁶ In this Bulletin, RMA encourages AIPs to maximize their use of remote communications and authorizations, including e-signatures and web portals. The Bulletin also reminds AIPs that farmers have the right to submit a request for a written agreement after the sales closing date, but on or before the acreage reporting date.²⁸⁷ To do so, farmers must demonstrate—including by self-certification of COVID-19 related issues—the physical inability to make the request on or before the sales closing date. Farmers can also request this extension if they need more time in which to provide any additional required documentation. In terms of providing information to AIPs, RMA states that farmer policyholders may communicate with their AIP electronically or over the phone in order to select policy elections (including coverage levels) and report any acreage or production. If farmers take advantage of this electronic

²⁸⁵ See RMA, COVID-19 Response (April 15, 2020), at: <https://www.rma.usda.gov/News-Room/Frequently-Asked-Questions/COVID-19-Response>.

²⁸⁶ RMA, Managers Bulletin: MGR-20-005, COVID-19 and Crop Insurance Deadlines (March 27, 2020) (expires Dec. 31, 2020), at: <https://www.rma.usda.gov/Policy-and-Procedure/Bulletins-and-Memos/2020/MGR-20-005>. See also, USDA News Release, USDA Adds Flexibilities for Crop Insurance to Support America's Farmers and Ranchers (March 27, 2020), at: <https://www.rma.usda.gov/en/News-Room/Press/Press-Releases/2020-News/USDA-Adds-Flexibilities-for-Crop-Insurance-to-Support-Americas-Farmers-and-Ranchers>. See, as well, RMA, COVID-19 Response (April 15, 2020), at: <https://www.rma.usda.gov/News-Room/Frequently-Asked-Questions/COVID-19-Response>.

²⁸⁷ Under the BP, a written agreement is a document that alters the designated terms of a policy. See, see Federal Crop Insurance Corporation, Common Crop Insurance Policy (Nov. 2019), at: <https://www.rma.usda.gov/-/media/RMAweb/Policies/Basic-Provisions/2020/Basic-Provisions-20-BR.ashx>.

option, they will be required to sign forms electronically, but then must provide the corresponding physical, signed forms no later than July 15, 2020.²⁸⁸

The second Managers Bulletin announces changes to the production reporting date under RMA's Common Crop Insurance Policy, Basic Provisions (BP).²⁸⁹ According to the Bulletin, for the 2019 and 2020 crop year, AIPs are authorized to accept production reports through the earlier of the acreage reporting date or thirty days after the applicable production reporting date.²⁹⁰ This applies only to crops insured under the BP with a production reporting date of March 15, 2020, or later. If a farmer fails to provide an acceptable production report by this deadline, the farmer will be considered to have failed to meet the requirements of the BP policy, which could result in assigned yields and ineligibility for optional units.²⁹¹

RMA's third Managers Bulletin waives interest charges for crop insurance premiums and authorizes AIPs to provide additional time for certain deadlines.²⁹² First, RMA authorizes AIPs to extend the deadline for payments of Written Payment Agreements that are due between March 1, 2020, and April 30, 2020, up to a maximum of sixty days after the scheduled payment due date. Any such extension will be considered timely and not a modification of the Payment Agreement. Second, RMA authorizes AIPs to waive interest accrual on premium payments and administrative fees to the earliest of an additional 60 days after the scheduled payment due date, or the termination date.²⁹³ This waiver applies only to policies with premium billing dates between March 1, 2020 and April 30, 2020. Finally, this Bulletin states that RMA will defer collection of any unpaid premiums and

²⁸⁸ The Bulletin states that farmers cannot change their initial certifications, unless authorized by RMA.

²⁸⁹ RMA, Managers Bulletin: MGR-20-006, COVID-19 and Impact on Production Reporting Date (PRD) for Crops Insured Under the Common Crop Insurance Policy, Basic Provisions (March 27, 2020) (expires Dec. 31, 2020), at: <https://www.rma.usda.gov/Policy-and-Procedure/Bulletins-and-Memos/2020/MGR-20-006>. See also, USDA News Release, USDA Adds Flexibilities for Crop Insurance to Support America's Farmers and Ranchers (March 27, 2020), at: <https://www.rma.usda.gov/en/News-Room/Press/Press-Releases/2020-News/USDA-Adds-Flexibilities-for-Crop-Insurance-to-Support-Americas-Farmers-and-Ranchers>. See, as well, RMA, COVID-19 Response (April 15, 2020), at: <https://www.rma.usda.gov/News-Room/Frequently-Asked-Questions/COVID-19-Response>.

²⁹⁰ The standard production reporting date under the Common Crop Insurance Policy, Basic Provisions, is the earlier of the acreage reporting date or 45 days after the cancellation deadline. See Federal Crop Insurance Corporation, Common Crop Insurance Policy, § 3(f) (Nov. 2019), at: <https://www.rma.usda.gov/-/media/RMAweb/Policies/Basic-Provisions/2020/Basic-Provisions-20-BR.ashx>.

²⁹¹ Specifically, farmers will be considered to have failed to meet the requirements of section 3(f) of the BP policy.

²⁹² RMA, Managers Bulletin: MGR-20-007, COVID-19 Relief—Deferral of Interest Charges on Crop Insurance Premiums (March 27, 2020) (expires Dec. 31, 2020), at: <https://www.rma.usda.gov/Policy-and-Procedure/Bulletins-and-Memos/2020/MGR-20-007>. See also, USDA News Release, USDA Adds Flexibilities for Crop Insurance to Support America's Farmers and Ranchers (March 27, 2020), at: <https://www.rma.usda.gov/en/News-Room/Press/Press-Releases/2020-News/USDA-Adds-Flexibilities-for-Crop-Insurance-to-Support-Americas-Farmers-and-Ranchers>. See, as well, RMA, COVID-19 Response (April 15, 2020), at: <https://www.rma.usda.gov/News-Room/Frequently-Asked-Questions/COVID-19-Response>.

²⁹³ Under the Common Crop Insurance Policy, Basic Provisions, interest begins to accrue starting the first day of the month following the AIP's issuance of notice that premiums are due, so long as a minimum of 30 days has passed from the premium billing date. See Federal Crop Insurance Corporation, Common Crop Insurance Policy, § 24 (Nov. 2019), at: <https://www.rma.usda.gov/-/media/RMAweb/Policies/Basic-Provisions/2020/Basic-Provisions-20-BR.ashx>.

administrative fees, and waive all related interest from AIPs, beginning with the April monthly accounting reports.

Finally, RMA has published on its website responses to various frequently asked questions relating to crop insurance and COVID-19.²⁹⁴ The frequently asked questions address many of the issues covered in RMA's Managers Bulletins, as well as changes to self-certification, whether COVID-19 is an insurable cause of loss (it is not), replanting payments, and assignment of indemnities.

C. Farmers with NAP Coverage—Be Cautious

The Noninsured Crop Disaster Assistance Program (NAP), which is administered by the USDA, provides crop loss assistance for farmers who are unable to obtain federal crop insurance for a particular crop.²⁹⁵ Similar to crop insurance, coverage under NAP requires the payment of fees and premiums, as well as compliance with complicated program rules.²⁹⁶

USDA has not yet released any information regarding how losses related to COVID-19 will be handled under NAP. Under existing NAP rules, insurable losses are generally limited to damaging weather, adverse natural occurrences, and related conditions.²⁹⁷ Any farmer who purchased NAP coverage should be extremely careful before making changes to their farming operation and should first contact FSA.

²⁹⁴ RMA, COVID-19 Response (April 5, 2020), at: <https://www.rma.usda.gov/News-Room/Frequently-Asked-Questions/COVID-19-Response>.

²⁹⁵ See, generally, 7 U.S.C. § 7333.

²⁹⁶ For a detailed description of NAP, see FLAG, Farmers' Guide to Disaster Assistance, Volume 6: Noninsured Crop Disaster Assistance Program (Dec. 2019), at: <http://www.flaginc.org/wp-content/uploads/2019/12/FGDA-NAP-December-2019.pdf>.

²⁹⁷ 7 C.F.R. § 1437.10 (2020).

Chapter Eleven: State, Local, and Tribal COVID-19 Relief Efforts

State, local, and tribal governments have the power to provide relief in response to COVID-19.²⁹⁸ This is especially true when it comes to the rights of farmers who face financial difficulty.

Many states have already enacted some forms of relief, including prohibiting foreclosure sales and evictions.²⁹⁹ For the most part, the moratoriums on foreclosures and evictions appear to apply to residential and commercial properties only. The extent to which they would apply to farmland that includes a homestead is not always clear. At least one state—Iowa—temporarily suspended foreclosure proceedings, including foreclosures of “agricultural real property.”³⁰⁰

Some states are also placing limits on debt collection activities and repossessions from private creditors.³⁰¹ The exact nature of these limits varies, from prohibiting self-help repossessions³⁰² to putting temporary stays on debt collector’s telephone calls to home residences. In some states, as well, debt collectors are considered “non-essential businesses” and therefore cannot operate if their state has ordered the closure of such businesses.³⁰³

These and other changes are likely to continue. It is important to note that many of the reforms will be temporary.

²⁹⁸ For a discussion of mayoral actions, see United Conference of Mayors, COVID-19: What Mayors Need to Know (2020) at <https://www.usmayors.org/issues/covid-19/>. Tribal responses are discussed by the Native Governance Center (2020), at: <https://nativegov.org/native-governance-center-and-covid-19/>.

²⁹⁹ See, National Consumer Law Center, COVID-19 State Foreclosure Moratoriums and Stays (April 3, 2020), at: <https://www.nclc.org/issues/foreclosures-and-mortgages/covid-19-state-foreclosure-moratoriums-and-stays.html>.

³⁰⁰ See State of Iowa, Proclamation of Disaster Emergency (March 22, 2020), at: <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.03.22.pdf>.

³⁰¹ See, for example, the discussion National Consumer Law Center, Major Consumer Protections Announced in Response to COVID-19 (April 9, 2020), at: <https://library.nclc.org/major-consumer-protections-announced-response-covid-19>. The relevant section is entitled “State Limits on Collection Lawsuits, Debt Collection, Repossessions (Private Creditors).”

³⁰² Self-help repossessions occur when a party claiming a right to ownership takes property back without going through the court system.

³⁰³ See, National Consumer Law Center, Major Consumer Protections Announced in Response to COVID-19 (April 9, 2020), at: <https://library.nclc.org/major-consumer-protections-announced-response-covid-19>.

Chapter Twelve: State, Federal, and Tribal Courts Respond

For many farmers facing financial troubles with their lenders, courts are crucial to ensuring that farmers' rights are upheld. This is true for state, federal, and tribal courts. Even amidst the COVID-19 crisis, it is essential that farmers continue to pay attention to any creditor actions or potential loan defaults that could require the farmer to take specific actions and meet deadlines.

Many state courts are responding to COVID-19 by ordering delays on certain matters and restricting the types of in-person proceedings that can occur. The National Center for State Courts has put together a list of all state court changes made in response to COVID-19.³⁰⁴ The extent of the delays and the specific restrictions that are adopted differ from state to state, but farmers must still respond to any deadlines and timelines imposed by the courts. Unless a farmer learns or is directed otherwise by the court, it is best to assume that state court deadlines have not been changed. Some state courts are also providing relief in the form of delaying the due dates for fines or fees, and suspending license and vehicle registration revocations.³⁰⁵

Federal courts have also begun to make changes in how they conduct themselves.³⁰⁶

Tribal courts have begun to take action as well.³⁰⁷ For example, one tribal court has delayed most civil matters.³⁰⁸

³⁰⁴ The list by the National Center for State Courts was updated most recently on April 10, 2020, and is at: <https://www.ncsc.org/~media/Files/PDF/Newsroom/Coronavirus-News-Updates-Roundups/Coronavirus%20and%20the%20Courts%20State%20Profiles%204-10-2020.ashx>. The Brennan Center is collecting information on court changes generally. See Courts' Responses to the Covid-19 Crisis (April 8, 2020), at: <https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis>.

³⁰⁵ See, National Consumer Law Center, Major Consumer Protections Announced in Response to COVID-19 (April 9, 2020), at: <https://library.nclc.org/major-consumer-protections-announced-response-covid-19>; see also, Fines and Fees Justice Center, COVID-19 Crisis: FFJC Policy Recommendations, Policy Tracker, and Advocacy Materials (April 10, 2020), at: <https://finesandfeesjusticecenter.org/articles/ffjc-policy-recommendations-for-the-covid-19-crisis/>.

³⁰⁶ Most appellate courts are restricting in-person hearings, but the courts are still operating, and deadlines still need to be followed. Helpful summaries of ongoing federal court changes include: United States Courts, Court Order and Updates During COVID-19 Pandemic (April 10, 2020), at: <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>; Robert Loeb et al, The Federal Courts Begin to Adapt to COVID-19 (March 18, 2020), at: <https://www.lawfareblog.com/federal-courts-begin-adapt-covid-19>; and Debra Cassens Weiss, SCOTUS and Other Courts Are Restricting Visitors or Canceling Proceedings Amid Coronavirus Concerns, ABA Journal (March 12, 2020), at: <https://www.abajournal.com/news/article/one-federal-court-suspends-court-appearances-others-restrict-visitors-amid-coronavirus-concerns>.

³⁰⁷ For information, see National American Indian Court Judges Association, Pandemic Resources for Tribal Courts, at: <https://naicja.wildapricot.org/>; and The Tribal Law and Policy Institute, Court and Legal Resources (2020) at <https://www.home.tlpi.org/courts-courtstaff>.

³⁰⁸ Nisqually Tribal Court Emergency Standing Order (March 17, 2020), at: <https://secureservercdn.net/50.62.172.232/tvl.3bf.myftpupload.com/wp-content/uploads/2020/03/Example-Tribal-Court-Emergency-Standing-Order.pdf>.

Chapter Thirteen: Scams

Unfortunately, scam artists often arrive soon after a disaster or emergency strikes. As we have already seen with price gouging, this reality remains true during this time of COVID-19 as well. Farmers should be careful. Be cautious and aware that during this time fraudulent charities and solicitations are out there. Look out for high-priced or low-quality products, and beware of any suspicious phone calls, texts, or emails. Loan modification scams may be especially common during the COVID-19 crisis.³⁰⁹

As far as the day-to-day work that must go on, farmers should try to get any work proposals or commitments in writing. When possible, farmers should avoid paying for things in cash, and should not pay more than one-third of any costs up front. It is also important not to let contractors or others force on-the-spot decisions.

State attorneys general are responsible for enforcing consumer protection laws that prohibit scams. The website for the National Association of Attorneys General provides information on potential scams during this time of COVID-19, and also provides links to the website for each state's Attorney General.³¹⁰ The Small Business Administration (SBA) is warning people about scams related to SBA COVID-19 relief.³¹¹ The Federal Trade Commission (FTC) is warning people about a number of COVID-19 scams, as is the Federal Communications Commission (FCC), and the Treasury Department is warning people about scams concerning stimulus payments.³¹²

³⁰⁹ For information on these types of scams, see Consumer Financial Protection Bureau, What Are Mortgage Loan Modification Scams? (Sept. 16, 2016), at: <https://www.consumerfinance.gov/ask-cfpb/what-are-mortgage-loan-modification-scams-en-272/>.

³¹⁰ Information on COVID-19 related scams can be found on the website for the National Association of Attorneys General, at: <https://www.consumerresources.org/beware-coronavirus-scams-and-price-gouging/>.

³¹¹ Small Business Administration, SBA Programs—Scams and Fraud Alerts (March 31, 2020), at: <https://www.sba.gov/document/report--sba-programs-scams-fraud-alerts>

³¹² Federal Trade Commission, Avoid Coronavirus Scams (2020), at: <https://www.consumer.ftc.gov/features/coronavirus-scams-what-ftc-doing>; Federal Communications Commission (FCC), COVID-19 Consumer Warnings and Safety Tips (2020), at: <https://www.fcc.gov/covid-scams>; Treasury Department, Covid-19 Scams (April 26, 2020), at: <https://home.treasury.gov/services/report-fraud-waste-and-abuse/covid-19-scams>.

Chapter Fourteen: Discrimination is Illegal

Numerous laws make various types of discrimination illegal.³¹³ In USDA programs, for example, discrimination is prohibited on the bases of race, color, religion, sex, age, national origin, marital status, sexual orientation, familial status, disability, limited English proficiency, or because all or a part of an individual's income is derived from a public assistance program.³¹⁴

³¹³ For a summary of some of these laws, see Federal Trade Commission, Protections Against Discrimination and Other Prohibited Practices, at: <https://www.ftc.gov/site-information/no-fear-act/protections-against-discrimination>.

³¹⁴ 7 C.F.R. § 15d.3(a) (2020).