

# Payment Limit Rules under the 2008 Farm Bill - Planning Implications for Producers

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## Overview

The Food, Conservation and Energy Act of 2008<sup>1</sup> (Act), generally effective for the 2009-2012 crop years retains many of the features of the 2002 Farm Bill, but did make several significant changes to the payment eligibility and payment limitation provisions of previous farm bills.<sup>2</sup> The Act adds the Average Crop Revenue Election (“ACRE”) program<sup>3</sup> and replaces the former “three-entity” rule with a rule of direct attribution.<sup>4</sup> Also, the Act utilizes a revised adjusted gross income (AGI) definition that is applicable to both individuals and entities.

The changes to the payment eligibility and payment limitation rules have important planning implications for individual producers and farming entities.

## Payment Eligibility – Miscellaneous Provisions

**Government entities.** Under the Act, a state or local government, political subdivision, or agency is ineligible for commodity or disaster program payments. But, payments may be received on publicly-owned land that is used for the support of public schools. There is no annual payment limit if the state in which the land is located

has a population of less than 1.5 million. If the population of the state is 1.5 million or more, the annual payment limit is \$500,000, per state.

**Deceased persons.** The Act directs the Ag Secretary to publish regulations within 180 days of enactment that describe the circumstances that allow issuing program payments in the name of deceased persons. The Act also directs the Ag Secretary to reconcile, twice annually, the Social Security numbers of program recipients with the Social Security Administration to determine if the recipients are alive.

**Ineligibility for payments.** The Act establishes a two-year ineligibility rule for failure to comply with the payment limitation rules, adopting or participating in a scheme or device to evade the payment limitation rules, or intentionally concealing the interest of a person or legal entity in a farming operation. There is an ineligibility rule of up to five years for knowingly engaging in or assisting in creating a fraudulent document, failing to disclose material information relevant to administering the payment limitation rules, or committing any other equally serious actions as the Ag Secretary determines.

**Treatment of cash-rent tenants.** The cash-rent tenant rule stays essentially the same, with clarification that a tenant under a cash lease who renders personal management, but not personal labor, is eligible for payments if the tenant makes a significant contribution of equipment.<sup>5</sup>

**“Scheme or device” rule.** Changes in a farming operation that are made with the intent to evade the payment limitation rules have long been prohibited. Under the Act, as in prior Farm Bills, changes must be bona fide and substantive. The Act specifies that adding a family member to a farming operation is bona fide and substantive.<sup>6</sup>

**Active engagement test.** The active engagement test is retained with a specification of six classes of producers for purposes of the test:

- Landowners (both individuals and entities owning land) – contribution of owned land meets the test if the returns from the land are based on the land’s production, the shares of profits or losses are commensurate with the contributions to the farming operation, and the contributions are at risk;
- Adult family member – if a majority of the participants in a farming operation are family members, an adult family member meets the test by making a significant contribution of active personal management or personal labor, the shares of profits or losses is commensurate with the contributions to the farming operation and contributions are at risk;
- Sharecropper – a significant contribution of personal labor meets

the test if the share of profits and losses is commensurate with contributions and the contributions are at-risk;

- Hybrid seed growers – the hybrid seed contract is not taken into account;
- Persons and entities receiving custom farming services – the general rules apply; and
- Spouses – a non-farming spouse satisfies the test if both spouses have an ownership interest in the farming assets, the farming spouse makes a significant contribution of labor and/or management, and the non-farming spouse provides active personal management via a combination of land, capital and equipment.<sup>7</sup>

**Note:** The estate of a deceased spouse may also satisfy the test.

### **Rules for Various Program Payments**

**Direct Payments.** Direct payments are fixed in amount, regardless of a producer’s annual variations in acres, yields and prices. The applicable payment limitation on direct payments for crop years 2008-2012 for a person or entity (whether received directly or indirectly) is \$40,000. The payment limit will be adjusted for participation in the ACRE program in years 2009-2012.<sup>8</sup> *Act, Sec. 1603(b), amending 7 U.S.C. §1308.*

**Note:** The Act authorizes advance direct payments (i.e., before Oct. 1 of the year in which the covered commodity is harvested), by election, for the 2008-2011 crop years. The advance direct payment percentage is 22 percent,

and payments are to be made as soon as practical after a producer makes an election. The advance payments are taxable in the year of receipt.<sup>9</sup>

**Counter-cyclical payments.** Counter-cyclical payments will be issued for each of the 2008-2012 crop years of each covered commodity if the effective price for the covered commodity is less than the target price for the covered commodity. In addition, counter-cyclical payments will be made after October 1 or as soon as is possible after the end of the marketing year for the covered commodity. Counter-cyclical payments are available to eligible producers if the “effective price” for the commodity is less than the commodity’s target price. The payment rate is the difference between the target price and the “effective price.”<sup>10</sup> “Effective price” for a covered commodity is the greater of the national average market price over the marketing year for the commodity or the national average loan rate for the commodity that is in effect, plus the payment rate in effect for direct payments. But, the computation for rice is based on the type or class of rice involved.<sup>11</sup> Counter-cyclical payments, if applicable, equal the payment rate multiplied by the payment acres multiplied by the payment yield.<sup>12</sup>

**Note:** Advance counter-cyclical payments are available for crop years 2008-2010 if the advance payment is requested within 60 calendar days before the end of the marketing year for the commodity involved. The advance payment is limited to a maximum of 40 percent of the estimated counter-cyclical payment for the commodity for the crop year. The advance payment will be made after completion of 180 calendar days of the marketing year for the covered commodity. The final

countercyclical payment will be made as soon as possible, but not before October 1 after the end of the applicable marketing year for the commodity. Advance payments are taxable in the year of receipt.<sup>13</sup>

The counter-cyclical payment limit amount is \$65,000 for crop years 2008-2012, and will be adjusted if the recipient participates in the ACRE program in years 2009-2012.<sup>14</sup> The payments, if applicable, will be made after the end of the marketing year for the covered commodity, but producers can receive partial payments on a projected basis.<sup>15</sup>

**Marketing Loan Program.** The marketing loan program consists of two major parts – (1) loan deficiency payments (LDPs) and (2) marketing assistance benefits. The LDP program is contained in the nonrecourse marketing assistance loan program and provides producers with financial tools to alleviate possible short-term cash flow needs without selling their crop. As such, producers can store their production and market their crops when conditions are more favorable. Upon entering the LDP program, a producer can either choose to receive a loan against their crop or, if prices are low, choose to be paid an LDP instead of taking out a loan.<sup>16</sup>

A producer can receive an LDP even though eligible for a marketing assistance loan. In addition, LDPs can be made for hay, silage and unshorn pelts even though those commodities don’t qualify for marketing assistance loans.<sup>17</sup> The payment rate for LDPs is computed by taking the loan rate for the commodity multiplied by the amount of the commodity not placed under a marketing assistance loan. The payment rate is the excess of the loan rate over the rate at which a marketing assistance loan may be repaid.

Also, the LDP amount is computed as of the date the producer requests the payment.<sup>18</sup> There is no payment limit applicable to LDPs.

**Note:** For the 2008-2012 crop years, for producers that are eligible for an LDP on wheat, barley or oats, but elect to use their acreage for livestock grazing, a payment can be made if the producer agrees to forego any other harvesting.<sup>19</sup>

The second part of the marketing loan program makes available, non-recourse marketing assistance loans for specified commodities. Loan availability is subject to conservation cross-compliance rules, but marketing assistance loans are not subject to any payment limitation.

**ACRE program.** In crop years 2009-2012, producers can make an irrevocable election to receive ACRE program payments.<sup>20</sup> The following restrictions apply to producers making the ACRE election:

- The producer is ineligible for counter-cyclical payments;
- The producer is subject to a 20 percent reduction in direct payments for covered commodities;
- The producer is subject to a 30 percent reduction in marketing assistance loan rates and LDPs for all covered commodities, and;
- For producers that operate multiple farms, with at least one farm enrolled in the ACRE program and at least one farm enrolled in non-ACRE programs, counter-cyclical and ACRE payments are subject to a combined \$65,000 payment limit.<sup>21</sup>

**Note:** All producers on a farm must make the election for it to be effective. The Act includes a complicated procedure for computing ACRE payments.<sup>22</sup>

### **Income Limitation Rule<sup>23</sup>**

The Act and subsequent regulations have established new AGI and adjusted gross farm income (AGFI) limitations for program eligibility.<sup>24</sup> The new limitations are considerably lower than the previous limitation of \$2,500,000 and could have application to more producers than did the limitation under prior law. As a result, the correct computation of AGI and AGFI can be critical for ensuring that a producer remains eligible for farm program payments.

The new income limitations are effective beginning with the 2009 crop year. For commodity and price support programs, a producer must have non-farm AGI of \$500,000 or less to be eligible for Direct and Counter-Cyclical Program (DCP) payments or price support benefits, and AGFI of \$750,000 or less to be eligible for direct payments under the DCP. For conservation program benefits, the adjusted gross nonfarm income limit is \$1 million *unless* two-thirds of AGI (both farm and non-farm) is derived from farming, ranching and forestry operations.<sup>25</sup> The Act also expands the definition of average AGI derived from farming, ranching and forestry to include income and benefits from the production of all types of livestock, farm-based renewable energy, and the processing, packing, storing, shedding, and transporting of farm, ranch, and forestry commodities (including renewable energy). In addition, the Bill gives the Ag Secretary the discretion to include the income from any additional activity related to farming, ranching or

forestry.

**Note:** The income from the sale of equipment used to conduct farm, ranch or forestry operations, and income from the provision of production inputs and services to farmers, ranchers, foresters and farm operations is included as farm income if two-thirds or more of the individual or entity's AGI is farm income.

**Warning:** Under the Administration's proposed 2010 budget, any farmer or farming operation with annual *gross sales* in excess of \$500,000 would be ineligible for farm program benefits. Benefits for these persons and entities would be phased-out over three years. The budget also proposes the elimination of Direct payments. The proposals are not part of an overall attempt to limit government spending and do not represent a budget cut for agricultural programs. Instead, the budget proposes an increase in spending on agricultural programs by shifting funding USDA-administered to food welfare programs.

The calculation of "average AGI" is computed over "an applicable three year period." For the 2009 program year, the three-year period involves tax years 2005, 2006 and 2007.

**Note:** Annual certifications of AGI compliance are required from each individual and legal entity<sup>26</sup> that requests CCC payments either directly or indirectly. The certifications can be made either on Form CCC-926, or by providing FSA with an acceptable statement from a CPA or attorney.<sup>27</sup>

## The Direct Attribution Rule

**In general.** As mentioned above, the Act eliminates the "three-entity" rule and replaces it with a rule of direct attribution. Under the direct attribution rule, farm program payments are directly attributed to a producer's social security number. Thus, each individual or entity is limited to \$40,000 of Direct payments (32,000 under the ACRE program). FSA will no longer make "person" determinations.

Under the Act, payments to a legal entity will be "attributed" to persons with a direct or indirect ownership interest in an entity through up to four levels of ownership in any embedded entities.<sup>28</sup> Also, the Act modifies the existing spousal rule where individuals of a joint operation may qualify for a payment regardless of their on-farm contribution. Thus, if one spouse is determined to be "actively engaged" in farming, the other (non-farm) spouse is deemed to have made a significant contribution of active personal labor, active personal management or a combination thereof to the same farming operation for purposes of the active engagement test.

**The "active engagement test.** Payments will be directly attributed to individuals that are actively engaged in farming, whether as an individual or as a member of an entity. Under the Act, the active engagement test is largely unchanged.<sup>29</sup> Sole proprietorships and general partnerships are treated alike under the active engagement test. Revocable trusts are also treated as an individual if the grantor is the beneficiary of the trust.<sup>30</sup> But, other types of business structures that limit liability of the owner(s) are treated as an "entity." These entities include C corporations, S corporations, limited liability companies (LLCs), limited

liability partnerships (LLPs) and irrevocable trusts.

To be eligible for direct payments or payments under the new ACRE program, each individual seeking payments must be “actively engaged” in the farming operation, by making a “significant contribution” (50% of their commensurate share) of capital, equipment, land, and active personal labor or management.

**Note:** Satisfaction of the active engagement test is often explained by use of the “right hand” and “left hand” rules. The “right hand” rule requires active personal labor and the “left hand” rule requires active personal management, such as a combination of a contribution of land, capital, and equipment.

At the entity level, every shareholder must provide documentation of contribution sufficient to satisfy the active engagement test. The contribution must be on a regular basis, identifiable and separate and distinct from anyone else in the entity.

**Note:** A good practice to ensure satisfaction of the active engagement test is to maintain up-to-date business notebooks and/or entity meeting minutes.

**Iowa clarification.** In early 2009, the Iowa state FSA office issued a memorandum clarifying paragraph 147 of the 4-PL publication.<sup>31</sup> Essentially, this clarification makes it easier for individuals and entities to satisfy the active engagement test and clears up some confusion for farmers and county offices. According to the memorandum, for an entity to receive full payments the members must “collectively” make a significant contribution (50 percent or more)

of active personal labor *and/or* active personal management. Therefore, an individual that only meets the right hand rule, is deemed “actively engaged.”

**Observation:** Many entities have shareholders who contribute to the farming operation in many ways, but do not contribute labor. It is now possible that such shareholders can satisfy the active engagement test.

The Memo also points out that the 4-PL requires each member of an entity to contribute active personal labor *and/or* active personal management in order for their share to be recognized for payment eligibility. Thus, the labor and management contribution, for each member, “does not have to be commensurate with the share of the entity, but must be performed on a regular basis, be identifiable, and be separate and distinct.

**Note:** The Memo cautions that each member of an entity should keep thorough documentation and be able to provide actual documentation of the different contributions they make. Paragraph 147E of the 4-PL provides examples of how shareholders (or members) of entities can properly document their contributions.

**Application of the direct attribution rule.**

The application of the direct attribution rule for purposes of determining eligibility for farm program payments can be explained as a three-step process: (1) examine the parties involved in the farming operation; (2) if one or more entities are involved in farming operations, determine the percentage ownership of each individual or entity; and (3) determine if farmland enrolled in farm programs is owned in trust (or whether a trust owns stock in a farming entity).

For trusts, the beneficiary (or beneficiaries) must satisfy labor and management requirements to have the trust's share of the entity remain eligible for direct payments. For multiple beneficiaries of a trust that owns shares in a farming entity, each beneficiary need not provide active personal labor or management. Instead, collectively the beneficiaries must provide 50 percent or more of the labor and management on land owned in trust.

### **Examples Illustrating the Direct Attribution Rule<sup>32</sup>**

**Example One:** Joe Farmer is single and operates a farming operation by himself. Joe can receive up to \$40,000 in Direct payments (\$32,000 under ACRE) if he can show both "right hand" and "left hand" participation.

**Example Two:** Jane Farmer operates a farming operation by herself as a sole proprietorship. Her husband, Joe, is not involved in the farming operation. Jane is eligible for up to \$40,000 in Direct payments (\$32,000 under ACRE) and Joe is eligible for payments as well. Joe need not meet the "right hand" rule because Jane does. However Joe must provide "left hand" contributions (i.e, active personal management via a combination of a contribution of land, capital and equipment).

**Note:** Jane will not be eligible for payments, however, if she rents a farm and has it custom-farmed. In that instance, she won't satisfy the "right hand" rule on that farm and will not be eligible for payments relating to that farm.

**Example Three:** Jane farms 2,000 acres and the average Direct payment is \$25 per

acre. Assume that Jane enrolls all of the land in the ACRE program. Consequently, her \$40,000 limit (Direct payments) is reduced to \$32,000 due to her enrollment in the ACRE program (20 percent reduction). However, if Jane is married, \$8,000 of Direct payments could be allocated to her husband if he satisfies the "left hand" rule.

**Example Four:** Jane owns all of the stock in a farming corporation. The corporation owns 2,000 acres of land and is enrolled in the ACRE program. The corporation is limited to \$40,000 in Direct payments, but that amount is reduced by 20 percent due to the land's enrollment in the ACRE program. The \$32,000 is attributed to Jane. The remaining \$8,000 is lost.

**Example Five:** Jane owns all of the stock in a farming corporation. The corporation owns 500 acres and rents 1500 from other owners. Jane conducts the farming operations for the corporation and meets both the "right hand" and "left hand" rules. The corporation is entitled to the "ownership exception" of the active engagement test, and the land that is rented qualifies because both the "right hand" and left hand" rules are satisfied.

**Example Six:** Jane and Joe, husband and wife, each own half of the stock in Jane Farmer, Inc., a farming corporation. The farmland is enrolled in the ACRE program. The corporation is eligible for only \$32,000 of Direct payments which will be directly attributed to Jane and Joe in accordance with their percentage ownership in the corporation. Thus, \$16,000 will be attributed to Jane, and \$16,000 will be attributed to Joe. Joe is eligible to receive payments as Jane's spouse if he satisfies the "left hand" rule.

**Note:** If Jane owned half of the corporate stock and her non-farmer brother owned the other half, the \$32,000 of Direct payments at the entity level would be directly attributed equally to Jane and her brother. But, Jane’s brother would not qualify to receive his \$16,000 share due to his failure to satisfy the “right hand” rule (and he can’t utilize the spousal exception for the “left hand” rule). However, if Jane had farming interests outside of the corporation she could still receive up to an additional \$16,000 in benefits from other operations.

But, if Jane’s brother were to begin working on the farm, 1000 hours of participation in a year will satisfy the right-hand rule. If her brother participates less than 1,000 hours per year, he could still qualify for payments under the rule that requires the shareholders, collectively, to make a significant contribution of labor (over 50%). As long as the brother’s involvement in the farming operation is performed on a *regular basis, identifiable, documentable, separate, and distinct*, he will qualify.

**Example Seven:** Farmers, Inc., a C corporation was formed several years ago by Helen and her now deceased husband. Presently, the stock ownership of the corporation and the involvement in farming operations by family members is as follows:

**Farmers Inc.**

Farmers Inc	Owner-ship %	Active Labor	Active Management
Son 1 (Tom)	19%	Yes	Yes
Son 2 (Jon)	19%	Yes	
Daughter (Barb)	2%	No	No
Mother (Helen)	30%		Yes
Bypass Trust (Helen sole life)	30%		Yes

beneficiary)			
Total	100%		

Farmers, Inc. cash rents 1370 acres of land from non-family members and an additional 150 acres from Tom and his wife Mary which Tom and Mary own equally. Farmers, Inc. employs Tom and pays him a salary. Jon provides labor to the corporation. Barb lives in town and does not provide active labor or management. Barb is considered a “passive” member. Helen is involved in all the major management decisions of Farmers, Inc., attends all of the board meetings, and often makes and delivers meals to the field to assist and oversee the operation and runs errands to assist in the farming operation. Helen owns 320 acres outright, and cash rents that land to Farmers Inc. In addition, Helen is the life beneficiary of a trust created under the will of her deceased husband, and the 320 acres contained in the trust is also cash rented to Farmer’s Inc.

The oldest son of Tom and Mary, (Charles) works for Farmers, Inc., but also has his own farming entity called Golden Ridge, LLC that he owns equally with his wife Linda. The youngest son of Tom and Mary, (Robert) is single and he works for Farmers, Inc. He owns 80 acres outright that he cash rents to Farmers, Inc.

Robert owns 1/3 of the combine and his share is valued at \$100,000. Farmers Inc. owns one-third of the combine, one-half of the planter and most of the older equipment valued at \$250,000.

Golden Ridge, LLC owns one-third of the combine, one-half of the planter and a variety of tractors and wagons valued at \$300,000. Charles and Linda also own a construction company, Conservation Construction Inc., which does conservation

work such as building terraces and ponds, and some tiling and other drainage work.

As noted above and in the previous examples, farm program payments have to get through two “gates” under the new rules. The first is through the “entity gate” if there is an entity, and the second is the “individual gate” for the actual payment allocation. As an entity, Farmers, Inc., would be entitled to \$40,000 in Direct payments.

Here is how the attribution and allocation rules work under the Act, based on the above facts.

**Step one** – determine ownership shares in the entity and the allocation of the entity’s payment (under the Act’s direct attribution rule) to shareholders based on their percentage ownership of the entity:

**Farmers, Inc.**

	Cash Rented	DP DCP	Direct Attribution	AP MGT.	AP Labor
Farmers, Inc	1370 acres	\$40,000		Yes	Yes
Tom (19%)			\$7,600	Yes	Yes
Jon (19%)			\$7,600	Yes	Yes
Barb (2%)			\$800	No	No
Helen (30%)			\$12,000	Yes	Yes
AB Trust (30%)			\$12,000	Yes	No
<b>Total</b>	<b>1370 acres</b>	<b>\$40,000</b>	<b>\$39,200</b>		

**Note:** If Farmers, Inc. had enrolled in the ACRE program, the applicable limit on Direct payments at the entity level would be \$32,000 (20 percent reduction).

**Observation:** FSA’s position is that the income beneficiary or beneficiaries of

a trust must provide the necessary labor and management necessary to meet the tests on cash-rented land. The fiduciary, if other than the beneficiary, cannot make the contribution.

**Step two** – determine the owners of the entity that are eligible and qualify for payments:

Jon qualifies to receive his allocated share of Direct payments because of his provision of active labor to the corporation. Barb *does not* provide labor or management and is considered a passive member. Thus, Barb’s is not qualified to receive her allocated share of Direct payments. Helen provides active management and active labor, thus her share of the entity qualifies. The trust satisfies the active management and active labor requirements due to Helen’s active labor and management. Consequently, Farmers, Inc. would be eligible to receive \$39,200 of Direct payments.

**Observation:** A potential future concern could arise if Helen could not be able to meet the right hand or the left hand rules due, perhaps, to health issues. In that event, an additional 30 percent of payments could be disqualified. In light of this potential, perhaps consideration should be made of beginning a strategy of gifting Helen’s stock to other family members that are active in the operation. However, all tax and non-tax issues should be considered before engaging in such a strategy.

**Application of the Rules to Golden Ridge, LLC:**

Golden Ridge is considered to be an “entity” (because the entity provides limited liability for its members), thus, both the entity and individual “gate” tests apply.

	Cash Rented	DP DCP	Direct Attribution	AP MGT.	AP Labor
Golden Ridge, LLC	1000 acres	\$ 40,000	\$ 0	Yes	Yes
Charles (husband) 50%			\$20,000	Yes	Yes
Linda (wife) 50%			\$20,000	No	No
<b>Total</b>		<b>\$40,000</b>	<b>\$40,000</b>		

Charles is active in the day-to-day operations of the LLC and provides both labor and management for the operation. However, Linda works a full-time job in town and does not provide labor and/or management. Under the Act, Linda qualifies to receive payments under the “spousal” rule - the contributions of active labor and management provided by Charles will allow Linda’s share of the corporation to be recognized. Golden Ridge LLC will receive full payment of \$40,000 in direct payments.

**Note:** The profits from the **Conservation Construction** company may have to be included in the income when filling out lines 5, 6, 7 and 8 of Form CCC-926 Average Adjusted Gross Income (AGI) Statement (revised 11-20-08). More details on the AGI issue are addressed in the article found at [www.calt.iastate.edu/agi](http://www.calt.iastate.edu/agi).

**Observation:** An additional concern for landlords and tenants is that FSA does not allow a tenant to enroll a

rental farm in the Federal Farm Program, even if that tenant has a valid and current Durable Power of Attorney for that landlord. However, the 2002 Farm Program Power of Attorney documents contained a clause stating specifically that the power of attorney is valid for the 2002 Farm Bill and subsequent Farm Bills. Thus, if the Power of Attorney is from 2002 and is marked such that it covers all current and future programs and actions that can be taken with respect to such programs, it is valid for all programs under the Act.

If you have any concerns you would like to address with the FSA regarding this issue, the notice and comment period ends in late March.

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<sup>1</sup> H.R. 6124, Pub. Law. No. 100-146, enacted into law on June 18, 2008, over Presidential veto. H.R. 6124 replaced an identical version of the 2008 Farm Bill, H.R. 2419 which contained only 14 of the 15 Titles of the legislation when Presented to the President. The President vetoed H.R. 2419, the Congress overrode the veto and then enacted H.R. 6124, which contained all 15 Titles when presented to the President for his subsequent veto.

<sup>2</sup> United States Department of Agriculture, Farm Service Agency, Notice PL-184 (December 19, 2008).

<sup>3</sup> Act, Sec. 1105(a).

<sup>4</sup> The removal of the three-entity rule is largely symbolic inasmuch as the spousal rule was not likewise repealed.

<sup>5</sup> Act, Sec. 1603(b).

<sup>6</sup> *Id.*

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<sup>7</sup> Act, Sec. 1603(d), *amending* 7 U.S.C. §1308-1.

<sup>8</sup> Act, Sec. 1603(b), *amending* 7 U.S.C. §1308.

<sup>9</sup> Act, Sec. 1601(e), *amending* 7 U.S.C. §7991(d).

<sup>10</sup> Act, Sec. 1104(d).

<sup>11</sup> Act, Sec. 1104(a)-(b).

<sup>12</sup> Act, Sec. 1104(e).

<sup>13</sup> Act, Sec. 1601(e), *amending* 7 U.S.C. §7991(d).

<sup>14</sup> *Id.*

<sup>15</sup> Act, Sec. 1104(f).

<sup>16</sup> LDP rates change daily and are determined for each county and crop according to loan rates and calculated posted county prices (PCPs). If the loan rate is above the PCP, producers are eligible for LDPs, and the LDP rate is the difference between the loan rate and the PCP. County loan rates are based on the national loan rate, a 12-month average PCP, production data, and the distance to terminal markets. The PCP is a price formulated to mimic crop marketing conditions in the county and is based on terminal market prices, adjustments reflecting market and transportation factors.

<sup>17</sup> Act, Sec. 1205(a).

<sup>18</sup> Act, Sec. 1205(b)-(e).

<sup>19</sup> Act, Sec. 1206(a)-(b).

<sup>20</sup> Act, Sec. 1105(a).

<sup>21</sup> The ACRE program also has state and farm trigger levels, both of which must be met before payments are made (expected state and farm yields are based on a 5-year Olympic average yield per planted acre). Therefore, if a farmer chooses to receive direct payments under the old system, all of those payments are certain. Under the ACRE program, only 80 percent of those direct payments are certain. The ACRE program does have other benefits not offered under the old direct payment system that producers should inform themselves of, such as revenue guarantees as opposed to a price guarantee. But, for purposes of the direct attribution scenario we discussed later, ACRE direct payments will be reduced to 80 percent of the normal payment.

<sup>22</sup> Act, Sec. 1105(b)-(f).

<sup>23</sup> For a more complete discussion of the income limitation rules, see Moore, Robert E. and Roger A. McEowen, "Determining "Income" For Farm Program Payment Eligibility Purposes," accessible at <http://www.calt.iastate.edu/briefs/CALT%20Legal%20Brief%20-%20AGI%20Rules%20for%20Farm%20Program%20Eligibility.pdf>.

<sup>24</sup> See 7 U.S.C. §1308-3a(e).

<sup>25</sup> 7 U.S.C. §1308-3a(e). This limitation can be waived on a case-by-case basis for environmentally sensitive land of special significance

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<sup>26</sup> For pass-through entities, AGI certifications are required from each member who is an individual or entity, and from each embedded interest holder. For other entities, the entity each interest holder in the entity with a direct or indirect interest must provide an annual AGI certification.

<sup>27</sup> Compliance with the AGI rules will be tracked through four levels of ownership in an entity. Any noncompliance within those levels will result in payment being reduced by an amount that is commensurate with the ineligible share.

<sup>28</sup> See FSA 4PI-A1, FSA Notice PL-184 and FSA Notice PL-185.

<sup>29</sup> The land ownership exemption still applies under which a person or legal entity that owns land may be considered "actively engaged in farming." FSA Notice PL-184.

<sup>30</sup> The FSA National Office has clarified that Paragraph 168 of 4-PL, item 5, is *not* to be interpreted in such a manner as to require revocable trusts where spouses are the grantors and income beneficiaries to obtain a Federal ID number. Instead, such trusts are allowed to use a Social Security number of one of the spouse-grantors. A Form CCC-902E is to be completed for the trust, but the trust will not be treated as an entity. The 4-PL Handbook is to be amended to include this clarification.

<sup>31</sup> Iowa FSA PL Memo. 09-08 (Feb. 9, 2009)(clarification for entities participating in federal farm programs).

<sup>32</sup> The comment period for the regulations upon which the following discussion is based is open until late March 2009.