

# Farmers' Guide to COVID-19 Relief

## Third Edition

August 4, 2020

**Farmer Legal Assistance Hotline**  
**877-860-4349**



Farmers' Legal Action Group

# Farmers' Guide to COVID-19 Relief 3rd Edition

August 4, 2020

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## Chapter I: Introduction

This Farmers' Guide to COVID-19 Relief (3<sup>rd</sup> Edition) offers a brief description of various programs that might benefit farmers.

### A. Current as of July 30, 2020

This Third Edition of the Guide is current as of July 30, 2020. As of this writing, some things remain to be decided about how the programs discussed will work. Some programs will certainly be changed. Others may soon expire. Please check the FLAG website for updates that will be ongoing.<sup>1</sup>

The First Edition of the Guide was published on April 13, 2020. The Second Edition was published on April 27, 2020. Due to changes in the programs, the Second Edition is quite different than the First Edition. The Third Edition updates the same topics that were covered in the Second Edition. In places, such as the chapter on the CARES Act SBA programs, the changes in the Third Edition are significant.

### 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.<sup>2</sup> The CARES Act became law on March 27, 2020. In addition, this Guide covers changes to the CARES Act programs that were made in more recent legislation.<sup>3</sup> Despite this additional legislation, and in some cases because of it, many parts of the law of COVID-19 relief remains confusing, and changes in the programs continue. This Guide also 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. 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. 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. Farmers are eligible for the PPP. Although the original CARES Act

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<sup>1</sup> The Farmers' Guide to COVID-19 Relief (3<sup>rd</sup> Edition) can be found on FLAG's website, at: <http://www.flaginc.org/covid-19-guide/>.

<sup>2</sup> 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>.

<sup>3</sup> See, for example, 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), at can be found here: <https://www.congress.gov/116/bills/hr266/BILLS-116hr266enr.pdf>.

funding for PPP ran out in mid-April, the Enhancement Act provides additional money for the program.

Chapter Three of the Third Edition of this Guide discusses a number of recent changes to the rules for PPP. Loan repayment rules have seen especially significant changes.

### **3. 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 Third Edition of this Guide incorporates the current rules for EIDL.

### **4. CARES Act Unemployment Insurance**

The CARES Act made 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. CARES Act Foreclosure Moratorium and Loan Forbearance**

The CARES Act mandates a foreclosure moratorium and loan forbearance 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. Coronavirus Food Assistance Program (CFAP)**

Under the CARES Act, both USDA and the Commodity Credit Corporation (CCC) received billions of dollars that went into the creation of the USDA Coronavirus Food Assistance Program (CFAP). CFAP provides billions of dollars in direct payment to farmers. It also funds the Farmers to Families Food Assistance Program, in which USDA funds are used to buy fresh produce, dairy and meat, and have it distributed.

Once the details of CFAP were released FLAG wrote a Farmers' Guide to CFAP that was published on May 29, 2020. When more details of the program were announced, including a number of important changes to the program, FLAG released a Second Edition of the Farmers' Guide to CFAP on June 17, 2020. That Second Edition is now available online at the FLAG website and can be found here:

<http://www.flaginc.org/covid-19-guide/>.

As a result, the Third Edition of this Guide has only the briefest description of CFAP in Chapter Six.

## **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, which have not changed since the Second Edition of this Guide.

## **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 Third Edition of this Guide describes the various regulatory guidance that has been issued to date. This guidance has not changed significantly since the Second Edition of the Guide was released.

## **9. USDA Administrative Response**

USDA's Farm Service Agency (FSA) has announced temporary changes to rules for FSA direct and guaranteed farm loans. 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 Third Edition of this Guide discusses USDA's administrative response to COVID-19, including developments since the Second 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.<sup>4</sup> 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).

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<sup>4</sup> 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](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 created what it calls “Recovery Rebates for Individuals.”<sup>5</sup> More frequently they are called “Economic Impact Payments.”<sup>6</sup> These payments, which have been widely discussed, go to eligible individuals—which can include farmers.<sup>7</sup>

In general, a household receives 1,200 dollars per eligible person. So, for many married couples that is a combined payment of 2,400 dollars. Five hundred dollars per qualifying child is also paid. The recovery rebates use what is often called “means testing” to ensure individuals meet the eligibility requirements, and the amount paid is 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.<sup>8</sup> The Internal Revenue Service (IRS) relies 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. Basic information on who is eligible for the payment is available from the IRS.<sup>9</sup>

Two additional points are relevant for these payments. First, some people had difficulty receiving their checks or cashing them, and some people lost them. For these and other problems, useful information is available online on the Internal Revenue Service website.<sup>10</sup>

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<sup>5</sup> CARES Act, Division A, Title 2, Subtitle A, Section 2201(a).

<sup>6</sup> 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>.

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

<sup>8</sup> 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).

<sup>9</sup> 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>.

<sup>10</sup> See IRS, Economic Impact Payments (July 27, 2020), at: <https://www.irs.gov/coronavirus/economic-impact-payments>.

### 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.<sup>11</sup> The more recent Paycheck Protection Program and Health Care Enhancement Act (the “Enhancement Act”) further modified the PPP and EIDL programs.<sup>12</sup>

#### 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.<sup>13</sup> Economic Injury Disaster Loans (EIDLs) from SBA have been around for many years but have mainly been unavailable to farms.<sup>14</sup> 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.<sup>15</sup> Farm-related businesses that are not what SBA thinks of as agricultural enterprises have been eligible businesses under SBA’s business loan programs.<sup>16</sup>

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 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

<sup>11</sup> 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.

<sup>12</sup> Enhancement Act, Division A—Small Business Programs, § 101(a)(1) (April 24, 2020).

<sup>13</sup> 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.

<sup>14</sup> 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>.

<sup>15</sup> 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>.

<sup>16</sup> 13 C.F.R. § 120.103 (2020).

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.<sup>17</sup> Under this program, banks and other lenders, including the Farm Credit System, make loans guaranteed by the federal government to small businesses.<sup>18</sup> 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, availability, and potential loan forgiveness of PPP has been confusing and has changed several times.

As of July 28, 2020, over five million loans have been made for about 520 billion dollars.<sup>19</sup>

#### ***a. CARES Act and Additional Funding for PPP***

The CARES Act originally gave 349 billion dollars in funding for the PPP.<sup>20</sup> According to SBA, that money ran out by April 16, 2020.<sup>21</sup> On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act) became law.<sup>22</sup> It gave an additional 310 billion dollars in funding for the PPP.<sup>23</sup> The ebb and flow of this funding explains the changes in availability of PPP that are discussed below.

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<sup>17</sup> CARES Act § 1102(a).

<sup>18</sup> Lenders can be existing SBA lenders, federally insured depository institutions, federally insured credit unions, and the Farm Credit System. CARES Act § 1102(a).

<sup>19</sup> SBA, Paycheck Protection Program (July 28, 2020), at <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

<sup>20</sup> CARES Act § 1102(b).

<sup>21</sup> 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>.

<sup>22</sup> Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act), 116 Pub Law 139, Division A—Small Business Programs § 101(a)(1) (April 24, 2020).

<sup>23</sup> 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. PPP Program Re-Opened and Extended Until August 8, 2020***

Under the original terms of the CARES Act, the deadline to apply for PPP was June 30, 2020.<sup>24</sup> That date came and went. Then, on July 4, 2020, an extension of PPP became law.<sup>25</sup> PPP applications will be accepted until August 8, 2020. SBA started accepting PPP applications again on July 6, 2020.<sup>26</sup>

PPP funds are available on a first come first serve basis.<sup>27</sup> This is an important detail, especially considering the history of funding and enrollment for the program. When the first round of funding ran out, SBA temporarily stopped accepting applications.<sup>28</sup> The Enhancement Act then provided additional money for the PPP, and SBA began accepting PPP applications again on April 27, 2020.<sup>29</sup> Although the PPP has been extended until August 8, 2020, no additional funding has been allocated for the program.

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, and one extension to the program. That could be the end, or there could be more money or more extensions. No one knows for sure.

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- <sup>24</sup> CARES Act § 1102(a)(2). See also 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.
- <sup>25</sup> Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 641 (June 5, 2020).
- <sup>26</sup> See SBA, Payback Protection Program, Notice: Paycheck Protection Program Has Reopened (July 24, 2020), at: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.
- <sup>27</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21752 (April 20, 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).
- <sup>28</sup> 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>.
- <sup>29</sup> 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>.



### ***c. Where to Apply***

The application for PPP is available online.<sup>30</sup> As noted above, farmers must apply for the PPP through banks and other lenders, including the Farm Credit System, who make loans to small businesses.<sup>31</sup> 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.<sup>32</sup> 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 resumed accepting applications again on July 6, 2020, or whether people will need to re-apply.

After the PPP ran out of its first funding source in April 2020, SBA and the Treasury Department issued a nonbinding statement that encouraged lenders “to process loan applications previously submitted by eligible borrowers and disburse funds expeditiously.”<sup>33</sup> Neither SBA nor the Treasury Department has issued any such statement since the re-opening of PPP on July 6, 2020. However, it seems likely that once a PPP application is submitted it would not be discarded during a time that no applications are accepted. If this is true for the current re-opening of the program, 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. Because it is unclear how SBA will handle applications in light of the extension to the program, it probably makes sense for applicants to try to verify with lenders that their application is still being processed.

### ***e. If an Application Was Denied***

If someone applies for PPP and is denied by the lender, the extension of the PPP application deadline does not mean that that previous application will be

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<sup>30</sup> 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>.

<sup>31</sup> Lenders can be existing SBA lenders, federally insured depository institutions, federally insured credit unions, and the Farm Credit System. CARES Act § 1102(a). A list of SBA lenders can be found here: <https://www.sba.gov/document/support-paycheck-protection-program-participating-lenders>.

<sup>32</sup> 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.

<sup>33</sup> 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>.

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.<sup>34</sup>

### **a. Acts**

The following Acts of Congress govern the PPP.

#### **(i) CARES Act (March 27, 2020)**

The CARES Act, which became law on March 27, 2020, created the PPP.<sup>35</sup>

#### **(ii) 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.<sup>36</sup>

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

#### **(iii) Paycheck Protection Program Flexibility Act (Flexibility Act) (June 5, 2020)**

The Paycheck Protection Program Flexibility Act of 2020, which became law on June 5, 2020, modifies some of the PPP loan forgiveness and loan maturity rules from the CARES Act.<sup>37</sup>

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

<sup>34</sup> 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 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>.

<sup>35</sup> CARES Act § 1102.

<sup>36</sup> Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act), 116 Pub Law 139, 134 Stat. 620 (April 24, 2020). As a bill, it was known as H.R. 266. A copy can be found here: <https://www.congress.gov/116/bills/hr266/BILLS-116hr266enr.pdf>.

<sup>37</sup> Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act), 116 Public Law 142, 134 Stat. 641 (June 5, 2020). As a bill, it was known as H.R. 7010. A copy can be found here: <https://www.congress.gov/116/plaws/publ142/PLAW-116publ142.pdf>.

## **b. Rules**

The following rules, most of which were published in the Federal Register, and will appear in the Code of Federal Regulations, provide important details for how the PPP operates.

### **(i) 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.<sup>38</sup> 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.<sup>39</sup>

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

### **(ii) 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.<sup>40</sup>

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

### **(iii) 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.<sup>41</sup>

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

### **(iv) 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.<sup>42</sup> This rule provides information about those who use a 2019 Form 1040

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<sup>38</sup> Business Loan Program Temporary Changes; Paycheck Protection Program, Small Business Administration, Interim Final Rule (Initial PPP 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.

<sup>39</sup> Initial PPP Interim Final Rule, at 1 (April 2, 2020).

<sup>40</sup> 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), at: <https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf>.

<sup>41</sup> 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), at: <https://home.treasury.gov/system/files/136/SBA%20IFR%202.pdf>.

<sup>42</sup> 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), at: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf>.

Schedule C, “Profit 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.”

**(v) Interim Final Rule (April 30, 2020)**

On April 30, 2020, the Treasury Department published an interim final rule in the Federal Register that provides details on PPP loan eligibility for seasonal employers.<sup>43</sup>

This Guide refers to this as the “PPP Seasonal Employer Interim Final Rule.”

**(vi) Interim Final Rule (June 1, 2020)**

On June 1, 2020, the SBA and Treasury Department published an interim final rule in the Federal Register that provides details on PPP loan forgiveness.<sup>44</sup> The Treasury Department published an unofficial version of this rule on May 22, 2020.

This Guide refers to this as the “First PPP Loan Forgiveness Interim Final Rule.”

**(vii) Interim Final Rule (June 16, 2020)**

On June 16, 2020, SBA published an interim final rule in the Federal Register that implements changes to the First Official PPP Interim Final Rule that were made in the Flexibility Act.<sup>45</sup>

Changes made by this rule include lengthening the maturity of PPP loans from two years to five years.<sup>46</sup> The rule also extends the PPP loan forgiveness period from eight weeks to twenty-four weeks.<sup>47</sup>

<sup>43</sup> Small Business Administration Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Criterion for Seasonal Employers, Interim Final Rule, 85 Fed. Reg. 23917 (April 30, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Criterion-for-Seasonal-Employers.pdf>.

<sup>44</sup> Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Loan Forgiveness, Interim Final Rule (Loan Forgiveness Interim Final Rule), 85 Fed. Reg. 33004 (June 1, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://www.govinfo.gov/content/pkg/FR-2020-06-01/pdf/2020-11536.pdf>.

<sup>45</sup> Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to First Interim Final Rule, Interim Final Rule, 85 Fed. Reg. 36308 (June 16, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://www.govinfo.gov/content/pkg/FR-2020-06-16/pdf/2020-12909.pdf>.

<sup>46</sup> PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020); Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 49 (June 25, 2020).

<sup>47</sup> PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020) (to be codified at 13 C.F.R. pt. 120).

This Guide refers to this as the “PPP Interim Final Rule—Revisions to First Interim Final Rule.”

### **(viii) Interim Final Rule (June 19, 2020)**

On June 19, 2020, SBA published an interim final rule in the Federal Register that reflects changes to the forgiveness rules for PPP loans made by the Flexibility Act.<sup>48</sup>

This rule clarifies the costs that are eligible for forgiveness under the PPP.<sup>49</sup> In addition, the rule provides that in order to receive forgiveness of the entire PPP loan, a borrower must spend at least 60 percent of the funds on payroll expenses, rather than the 75 percent that was originally required under the CARES Act.

This Guide refers to this as the “PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules.”

### **(ix) Interim Final Rule (June 26, 2020)**

On June 26, 2020, an interim final rule from the SBA was published in the Federal Register that outlines changes to PPP eligibility made by the Flexibility Act.<sup>50</sup>

This Guide refers to this as the “PPP Interim Final Rule—Additional Eligibility.”

### **(x) Interim Final Rule (June 26, 2020)**

On June 26, 2020, an interim final rule from the SBA was published in the Federal Register that reflects PPP loan forgiveness changes made by the Flexibility Act.<sup>51</sup>

### **(xi) Other Official Rules (Released Since April 24, 2020)**

SBA and the Department of Treasury have released several other rules for PPP that are of less direct importance for most family farmers.<sup>52</sup>

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<sup>48</sup> Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to the Third and Sixth Interim Final Rules, Interim Final Rule, 85 Fed. Reg. 36997 (June 19, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-13293.pdf>.

<sup>49</sup> PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36998-36999 (June 19, 2020).

<sup>50</sup> Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Revisions to First Interim Final Rule, Interim Final Rule, 85 Fed. Reg. 38301 (June 26, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://home.treasury.gov/system/files/136/PPP--IFR--Additional-Eligibility-Revisions-to-First-Interim-Final-Rule.pdf>.

<sup>51</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304 (June 26, 2020), at: <https://www.govinfo.gov/content/pkg/FR-2020-06-26/pdf/2020-13782.pdf>.

<sup>52</sup> These additional rules include: (1) Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, Interim Final Rule, 85 Fed. Reg. 23450 (April 28, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf>; (2) Business Loan Program Temporary Changes;

### (xii) 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.<sup>53</sup>

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

In addition to the 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.<sup>54</sup> This information sheet refers borrowers to SBA information about eligibility for businesses based on their size.<sup>55</sup> The Treasury Department has a Paycheck

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Paycheck Protection Program—Requirements—Disbursements, Interim Final Rule, 85 Fed. Reg. 26321 (May 4, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Disbursements.pdf>; (3) Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders, Interim Final Rule, 85 Fed. Reg. 26324 (May 4, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://home.treasury.gov/system/files/136/IFR--Corporate-Groups-and-Non-Bank-and-Non-Insured-Depository-Institution-Lenders.pdf>; (4) Business Loan Program Temporary Changes; Paycheck Protection Program—Nondiscrimination and Additional Eligibility Criteria, Interim Final Rule, 85 Fed. Reg. 27287 (May 8, 2020) (to be codified at 13 C.F.R. pts. 113, 120), at: <https://home.treasury.gov/system/files/136/IFR-Nondiscrimination-and-Additional-Eligibility-Criteria.pdf>; (5) Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request, Interim Final Rule, 85 Fed. Reg. 29845 (May 19, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Extension-of-Limited-Safe-Harbor-with-Respect-to-Certification-Concerning-Need-for-PPP-Loan-Request.pdf>; (6) Business Loan Program Temporary Changes; Paycheck Protection Program—Loan Increases, Interim Final Rule, 85 Fed. Reg. 29842 (May 19, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Loan-Increases.pdf>; (7) Business Loan Program Temporary Changes; Paycheck Protection Program—Treatment of Entities with Foreign Affiliates, Interim Final Rule, 85 Fed. Reg. 30835 (May 21, 2020) (to be codified at 13 C.F.R. pts. 120, 121), at: <https://www.govinfo.gov/content/pkg/FR-2020-05-21/pdf/2020-10967.pdf>; (8) Business Loan Program Temporary Changes; Paycheck Protection Program—Second Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan and Lender Reporting, Interim Final Rule, 85 Fed. Reg. 31357 (May 26, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://home.treasury.gov/system/files/136/IFR--Second-Extension-of-Limited-Safe-Harbor-with-Respect-to-Certification-Concerning-Need-for-PPP-Loan-and-Lender-Reporting-5-20-2020.pdf>; (9) Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010 (June 1, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://www.govinfo.gov/content/pkg/FR-2020-06-01/pdf/2020-11533.pdf>; (10) Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Revisions to First Interim Final Rule, Interim Final Rule, 85 Fed. Reg. 36717 (June 18, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://www.govinfo.gov/content/pkg/FR-2020-06-18/pdf/2020-13130.pdf>; (11) Business Loan Program Temporary Changes; Paycheck Protection Program—Certain Eligible Payroll Costs, Interim Final Rule, 85 Fed. Reg. 39066 (June 30, 2020) (to be codified at 13 C.F.R. pt. 120), at: <https://home.treasury.gov/system/files/136/PPP--IFR--Certain-Eligible-Payroll-Costs.pdf>.

<sup>53</sup> For example, some SBA affiliation rules also apply to PPP borrowers. See 13 C.F.R. § 121.301 (2020).

<sup>54</sup> Paycheck Protection Program (PPP) Information Sheet: Borrowers, at: <https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf>.

<sup>55</sup> Small Business Administration (SBA), Contracting Guide, Size Standards, at: <https://www.sba.gov/federal-contracting/contracting-guide/size-standards>.



Protection Program Loans Frequently Asked Questions (FAQs) page that is sometimes updated.<sup>56</sup> There are also press statements issued by SBA, and SBA has put some useful information on its website.<sup>57</sup>

### 3. PPP Eligibility Rules

The following sections describe the PPP eligibility rules.

#### a. Eligible Businesses

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 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.

##### (i) Various Kinds of Smaller Businesses

A variety of smaller entities are eligible for PPP. These include businesses in general,<sup>58</sup> as well as tribal business concerns,<sup>59</sup> tax-exempt nonprofits,<sup>60</sup> and tax-exempt veterans organizations.<sup>61</sup> The PPP application allows a variety of other business entities as well.<sup>62</sup>

To be eligible, these entities must be small in that they generally must not have more than 500 employees.<sup>63</sup> For this purpose, part-time employees, full-time employees, and people hired on another basis, all count as individual employees.<sup>64</sup> The employees must have their principal place of

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<sup>56</sup> Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs) (June 25, 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.

<sup>57</sup> See SBA, Payback Protection Program (April 26, 2020), at: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

<sup>58</sup> 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).

<sup>59</sup> 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).

<sup>60</sup> 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.

<sup>61</sup> 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.

<sup>62</sup> 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.

<sup>63</sup> 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 Loans Frequently Asked Questions (FAQs), Question 3 (June 25, 2020).

<sup>64</sup> CARES Act § 1102(a)(2); Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 36 (June 25, 2020).

residence in the United States, and they must have been paid salaries and payroll taxes or been paid as independent contractors.<sup>65</sup>

It is also possible 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.<sup>66</sup>

## **(ii) Small Business Concerns**

What SBA calls "small business concerns" are also eligible for PPP.<sup>67</sup> SBA rules define a small business concern.<sup>68</sup> 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.<sup>69</sup>

### ***b. Eligible Self-Employed Individuals, Sole Proprietorships, and Independent Contractors***

PPP allows self-employed individuals, sole proprietorships, and independent contractors to be eligible as borrowers.<sup>70</sup>

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- <sup>65</sup> 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.
- <sup>66</sup> 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 Loans Frequently Asked Questions (FAQs), Question 2 (June 25, 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](http://www.sba.gov/size).
- <sup>67</sup> 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%20Updated%20%281%29.pdf>.
- <sup>68</sup> 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%20Updated%20%281%29.pdf>.
- <sup>69</sup> 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 Loans Frequently Asked Questions (FAQs), Question 2 (June 25, 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.
- <sup>70</sup> CARES Act § 1102(a)(2); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 20, 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



### **(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.<sup>71</sup>

First, the self-employed person must have been in operation on February 15, 2020.<sup>72</sup>

Second, a self-employed person must have self-employment income.<sup>73</sup> This can be, for example, income from an independent contractor or a sole proprietor.

Third, the self-employed person must have a principal place of residence in the United States.<sup>74</sup>

Fourth, the self-employed person must have filed, or intend to file, a 2019 IRS Form 1040 Schedule C.<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup> 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.

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they are a: (1) sole proprietor; (2) independent contractor; or (3) eligible self-employed individual. PPP Borrower Application Form, at 1.

<sup>71</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 20, 2020).

<sup>72</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 20, 2020).

<sup>73</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 20, 2020).

<sup>74</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 20, 2020).

<sup>75</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 20, 2020).

<sup>76</sup> 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).

<sup>77</sup> Self-Employed PPP Interim Final Rule, See 85 Fed. Reg. 21747, 21748 (April 20, 2020).

Corporation Income Tax Return.”<sup>78</sup> 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.”<sup>79</sup> 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.”<sup>80</sup> Schedule 1, in turn, has a line for “business income or (loss).” To get that number, the taxpayer must use “Schedule C, Profit or Loss From Business.”<sup>81</sup> 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.<sup>82</sup> Most farmers file a Schedule F, “Profit and Loss from Farming,” as well as a Form 1040.<sup>83</sup> 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

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- <sup>78</sup> 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>.
- <sup>79</sup> 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>.
- <sup>80</sup> Schedule 1 (Form 1040 or 1040-SR), Additional Income and Adjustments to Income (2019), at: <https://www.irs.gov/pub/irs-pdf/f1040s1.pdf>.
- <sup>81</sup> 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>.
- <sup>82</sup> Farm taxes are discussed in IRS Publication 225, Farmers Tax Guide (2019), at: <https://www.irs.gov/pub/irs-pdf/p225.pdf>.
- <sup>83</sup> 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>.

Schedule F.<sup>84</sup> 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.

The Treasury Department, however, has since released guidance that says farmers can use Schedule F in place of Schedule C.<sup>85</sup> Specifically, it says self-employed farmers who report their net farm profits on IRS Form 1040 Schedule 1 and Schedule F should use Schedule F, line 34 (net farm profit), in place of Schedule C, line 31 (net profit). In order to be eligible for a PPP loan as a self-employed farmer, the farmer's net profit on line 34 of Schedule F must be greater than zero.<sup>86</sup>

According to the Treasury guidance, in all other respects the PPP calculation for Schedule F filers is the same as that for Schedule C filers. 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.”<sup>87</sup> 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.<sup>88</sup> 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

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<sup>84</sup> See IRS Form 1099-MISC (2020), at: <https://www.irs.gov/pub/irs-pdf/f1099misc.pdf>.

<sup>85</sup> Treasury Department, Paycheck Protection Program: How to Calculate Maximum Loan Amounts—By Business Type, Question 3 (June 26, 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.

<sup>86</sup> Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Questions 1, 3 (June 26, 2020).

<sup>87</sup> Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, page 1 (June 26, 2020).

<sup>88</sup> Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 34 (June 25, 2020).

PPP.<sup>89</sup> Small farm cooperatives are also eligible.<sup>90</sup> The FAQ adds details that suggest some farms with more than 500 employees can still be eligible.<sup>91</sup>

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.<sup>92</sup> This is because independent contractors can themselves apply for a PPP 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.<sup>93</sup> 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.<sup>94</sup>

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<sup>89</sup> Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 34 (June 25, 2020).

<sup>90</sup> Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 35 (June 25, 2020).

<sup>91</sup> 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 Loans Frequently Asked Questions (FAQs), Question 34 (June 25, 2020).

<sup>92</sup> 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.

<sup>93</sup> 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 Loans Frequently Asked Questions (FAQs), Question 5 (June 25, 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>.

<sup>94</sup> 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

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.<sup>95</sup> 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”).<sup>96</sup> 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.<sup>97</sup>

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.<sup>98</sup> Second, a borrower can be eligible for PPP if it is a tax-exempt nonprofit, tax-exempt veterans organization, tribal business concern, or any other business concern.<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> This rule changed the affiliation rules to make it harder for some businesses, such as contract poultry growers, to

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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).

<sup>95</sup> 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).

<sup>96</sup> Affiliation Interim Final Rule, 85 Fed. Reg. 20817 (April 15, 2020).

<sup>97</sup> Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20818 (April 15, 2020).

<sup>98</sup> 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).

<sup>99</sup> 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).

<sup>100</sup> Affiliation Interim Final Rule, 85 Fed. Reg. 20817, 20818-20819 (April 15, 2020).

<sup>101</sup> 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.

<sup>102</sup> See SBA, Office of Inspector General, Evaluation of SBA 7(A) Loans Made to Poultry Farmers, Report Number 18-13.

<sup>103</sup> 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)).

receive Section 7(a) SBA loans.<sup>104</sup> The CARES Act, however, permanently rescinded that interim final rule.<sup>105</sup> 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.

***f. Business Must Have Been in Operation as of February 15, 2020 – With an Exception***

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.<sup>106</sup>

If a seasonal business was dormant or not fully operating as of February 15, 2020, it may still be eligible for PPP if it was in operation for any eight-week period between May 1, 2019 and September 15, 2019.<sup>107</sup> This exception to the February 15 rule could be especially helpful for farms.

***g. Other Eligibility Rules—What Makes Borrowers Ineligible***

SBA rules explain that certain potential borrowers are not eligible for PPP.<sup>108</sup>

<sup>104</sup> 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)).

<sup>105</sup> 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)).

<sup>106</sup> CARES Act § 1102(a)(2); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 20, 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).

<sup>107</sup> PPP Seasonal Employer Interim Final Rule, 85 Fed. Reg. 23917, 23918 (April 30, 2020). Previous guidance issued by the Treasury Department on April 6, 2020 provided that seasonal employers could be eligible for PPP if they were in operation for any eight-week period between February 15, 2019 and June 30, 2019. See Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 9 (posted April 6, 2020).

<sup>108</sup> 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>.



**(i) Delinquent or Default on Federal Loan**

Anyone who has previously received a direct or guaranteed loan from SBA or any other Federal agency, including FSA, and is delinquent on the loan or defaulted on it within the past seven years is not eligible for PPP.<sup>109</sup>

**(ii) Illegal Activity**

Anyone engaged in any activity that is illegal under federal, state, or local law is not eligible for PPP.<sup>110</sup> This likely means that if the activity is legal under state law, but illegal under federal law, the person is not eligible.

**(iii) Household Employer**

Anyone who is considered to be a “household employer,” meaning an individual who employs household employees such as nannies or housekeepers, is not eligible.<sup>111</sup>

**(iv) Some Criminal Charges, Probation, Parole, or Incarceration**

An owner—with a twenty percent or greater interest in a business—who is presently incarcerated or subject to indictment, criminal information, arraignment, or other means by which formal felony criminal charges are brought, is ineligible for PPP.<sup>112</sup> In addition, within the last five years, if an owner has been convicted of, pled guilty or nolo contendere to, or commenced any form of probation or parole for, a felony involving fraud, bribery, embezzlement, or a false statement on a loan application or application for federal financial assistance, the owner is ineligible. Finally, anyone convicted of a felony in the last year is not eligible for PPP.

**(v) Some Bankruptcy**

Potential borrowers are not eligible for PPP if the borrower is involved in a bankruptcy proceeding anytime between when the PPP application is submitted and when the loan funds are disbursed.<sup>113</sup>

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<sup>109</sup> First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 7 (April 2, 2020).

<sup>110</sup> First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 7 (April 2, 2020).

<sup>111</sup> 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.

<sup>112</sup> PPP Interim Final Rule—Additional Eligibility, 85 Fed. Reg. 38301, 38302-38303 (June 26, 2020); Interim Final Rule, 85 Fed. Reg. 36717, 36718 (June 18, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020); Initial PPP Interim Final Rule, at 7 (April 2, 2020).

<sup>113</sup> PPP Promissory Notes, Authorizations, Affiliation, and Eligibility Interim Final Rule, 85 Fed. Reg. 23450, 23451 (April 28, 2020); PPP Borrower Application Form, page 1. If an applicant enters bankruptcy after the PPP application has been submitted, it is the applicant's responsibility to notify the lender and ask that the application be cancelled. See PPP Promissory Notes, Authorizations, Affiliation, and Eligibility Interim Final Rule, 85 Fed. Reg. 23450, 23451 (April 28, 2020).

#### 4. 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.<sup>114</sup> If no such documents are available, the borrower must provide other supporting documentation, such as bank records, that demonstrate the qualifying payroll amount.<sup>115</sup> Borrowers must keep their PPP documentation for six years after the date the PPP loan is either forgiven or repaid in full, and they must allow representatives of SBA, including those from SBA's Office of Inspector General, to access the documentation upon request.<sup>116</sup>

##### *a. Documentation for Self-Employed Schedule C Filers*

PPP documentation rules for the self-employed rely heavily on IRS Form 1040 Schedule C.<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup> 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.

<sup>114</sup> 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.

<sup>115</sup> 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).

<sup>116</sup> Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010, 33012 (June 1, 2020).

<sup>117</sup> See generally Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747 (April 20, 2020).

<sup>118</sup> See Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 20, 2020); see also Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 1 (June 26, 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.

<sup>119</sup> 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 20, 2020).



### ***b. 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, first issued on April 24, 2020, advises that self-employed farmers must provide their 2019 IRS Form 1040 Schedule 1 and Schedule F with their PPP applications.<sup>120</sup> 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.

## **5. PPP Loan Amount and Terms**

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, and the terms of the loans.

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.<sup>121</sup>

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.<sup>122</sup>

### ***a. Payroll Costs Defined***

PPP loans are based on a borrower's payroll costs, which are essentially the compensation costs for workers.<sup>123</sup>

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;<sup>124</sup> (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.<sup>125</sup>

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<sup>120</sup> Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 3 (June 26, 2020).

<sup>121</sup> Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 3 (June 26, 2020).

<sup>122</sup> Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Questions 1, 3 (June 26, 2020).

<sup>123</sup> First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 10 (April 2, 2020).

<sup>124</sup> 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).

<sup>125</sup> CARES Act § 1102(a)(2); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 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).

To be included in a business' eligible payroll costs, employees must have their principal residence in the United States.<sup>126</sup> 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.<sup>127</sup>

The amount of payroll costs that will be considered under the PPP are capped at \$100,000 per year for every employee.<sup>128</sup>

Federal payroll taxes imposed or withheld between February 15, 2020 and June 30, 2020 are not included in PPP payroll costs.<sup>129</sup>

### ***b. Calculating 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 or Schedule F.

#### **(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.<sup>130</sup>

**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

<sup>126</sup> 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).

<sup>127</sup> CARES Act § 1102(a)(2); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749-21750 (April 20, 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.

<sup>128</sup> 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).

<sup>129</sup> 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.

<sup>130</sup> 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.

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 (EIDL), 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.

## **(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.<sup>131</sup> That average monthly cost is then multiplied by 2.5 to get the PPP loan amount.

## **(iii) Seasonal Employers**

The method for determining the loan amount for a seasonal employer is calculated by taking the following steps.<sup>132</sup> As noted below, seasonal employers have the choice between two different timeframes when determining their average payroll costs.

**Step One:** Determine the seasonal employer's average monthly payroll costs (as defined above) for either the average between February 15, 2019 and June 30, 2019, or any twelve-week period between May 1, 2019, and September 15, 2019.<sup>133</sup> The seasonal employer may decide which period to use.<sup>134</sup>

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<sup>131</sup> 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.

<sup>132</sup> CARES Act § 1102(a)(2).

<sup>133</sup> See PPP Borrower Application Form, at 3 (revised June 24, 2020). The June 24, 2020 PPP application provides a slightly different requirement than a rule issued on April 30, 2020. For the requirements under the earlier rule, see PPP Seasonal Employer Interim Final Rule, 85 Fed. Reg. 23917, 23918 (April 30, 2020).

<sup>134</sup> PPP Seasonal Employer Interim Final Rule, 85 Fed. Reg. 23917, 23918 (April 30, 2020); Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 41 (June 25, 2020). Seasonal employers who received a PPP loan prior to the issuance of the April 30, 2020 rule may be eligible for an increased loan amount. See Business Loan Program Temporary

**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.<sup>135</sup> 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.<sup>136</sup>

**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. 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.<sup>137</sup> As noted above, Treasury Department guidance states that farmers are allowed to use a

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Changes; Paycheck Protection Program—Loan Increases, Small Business Administration, Interim Final Rule, 85 Fed. Reg. 29842, 29843-29844 (May 19, 2020).

<sup>135</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748-21749 (April 20, 2020); Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 1 (June 26, 2020).

<sup>136</sup> Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Questions 1, 3 (June 26, 2020).

<sup>137</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 20, 2020); Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 2 (June 26, 2020).

Schedule F in place of Schedule C, and therefore the Schedule F can be used to perform a similar calculation as the one below.<sup>138</sup>

**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.<sup>139</sup> 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.<sup>140</sup>

**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, 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.<sup>141</sup>

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<sup>138</sup> Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Questions 2-3 (June 26, 2020).

<sup>139</sup> 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 20, 2020).

<sup>140</sup> Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Question 2 (June 26, 2020).

<sup>141</sup> See, for example, Treasury Department, How to Calculate Maximum Loan Amounts—By Business Type, Questions 4, 5, 7 (June 26, 2020). The method for calculating PPP loan amounts for partnerships changed with the issuance of the Self-Employed PPP Interim Final Rule on April 30, 2020. See Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21748 (April 20, 2020). Consequently, partnerships that received a PPP loan prior to the issuance of the April 15, 2020 rule may be eligible for an increased PPP loan amount. See Business Loan Program Temporary Changes; Paycheck Protection Program—Loan Increases, Small Business Administration, Interim Final Rule, 85 Fed. Reg. 29842 (May 19, 2020).

## 6. Cost of the PPP

The cost of PPP loans is covered by the federal government.<sup>142</sup> Lenders receive payment from the federal government for making the loans.

## 7. Additional Terms of PPP Loans

There are few additional terms for a PPP loan.

### *a. Only One PPP Loan Per Borrower*

No eligible borrower may receive more than one PPP loan.<sup>143</sup>

### *b. No Personal Guarantees, Collateral, or Fees Required*

No personal guarantees are required, and no collateral is required.<sup>144</sup> 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.

### *c. Timeframe for PPP Loan Repayment*

With the passing of the Flexibility Act on June 5, 2020, the rules for PPP loan repayment have changed.

For PPP loans made prior to June 5, 2020, the loans are due in two years if not forgiven.<sup>145</sup> New rules allow borrowers and lenders to extend the maturity of the loan to five years if both parties agree.<sup>146</sup>

Loans made on or after June 5, 2020, become due in five years if they are not forgiven.<sup>147</sup>

### *d. Ten-Month Deferral Period*

Following the passing of the Flexibility Act, payments on PPP loans, including interest payments on the loans, are deferred for the ten months immediately

<sup>142</sup> 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).

<sup>143</sup> 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.

<sup>144</sup> First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20816 (April 15, 2020); Initial PPP Interim Final Rule, at 25 (April 2, 2020).

<sup>145</sup> 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 initially determined that two years was sufficient. Compare CARES Act § 1102(a)(2) with Initial PPP Interim Final Rule, at 12 (April 2, 2020).

<sup>146</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38305 (June 26, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020).

<sup>147</sup> Flexibility Act, § 2(a) (June 5, 2020); PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306 (June 26, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020).

following the borrower's loan forgiveness covered period.<sup>148</sup> The loan forgiveness period is defined later in this Guide.

This ten-month deferral period is an extension from the six-month deferral period allowed by earlier PPP rules.<sup>149</sup> If a borrower does not submit a loan forgiveness application to the lender within that ten-month period, the borrower will be required to begin making loan payments—on both principal and interest—immediately following the end of the deferral period.<sup>150</sup> For example, if a borrower's covered period ends on December 10, 2020, and the borrower does not submit a loan forgiveness application to the lender by October 10, 2021, the borrower will need to begin making payments on the loan on or after October 10, 2021.

#### ***e. Interest Rate is 1 Percent***

The interest rate for a borrower on a PPP loan that is not forgiven is 1 percent.<sup>151</sup> This 1 percent interest will accrue during the deferral period, even though the borrower does not have to pay anything during that period.<sup>152</sup>

### **8. 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, or utility payments.<sup>153</sup> SBA will seek repayment of funds used in an unauthorized way.<sup>154</sup> If done knowingly, there could be additional liability and criminal charges.<sup>155</sup>

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, issued in April 2020, as well as a later June 16, 2020, revision, provide the rules that will apply to most PPP borrowers.<sup>156</sup> The Self-Employed PPP Interim Final Rule, however, outlines the rules

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<sup>148</sup> Flexibility Act, § 3 (June 5, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020).

<sup>149</sup> For the previous rules on deferral periods, see 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.

<sup>150</sup> PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020).

<sup>151</sup> First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20816 (April 15, 2020); Initial PPP Interim Final Rule, at 25 (April 2, 2020).

<sup>152</sup> PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 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).

<sup>153</sup> PPP Borrower Application Form at 2; see also Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Questions 31, 46 (June 25, 2020).

<sup>154</sup> First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20814 (April 15, 2020); Initial PPP Interim Final Rule, at 17 (April 2, 2020).

<sup>155</sup> PPP Borrower Application Form, page 2.

<sup>156</sup> See PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36311 (June 16, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811 (April 15, 2020); see also Initial PPP Interim Final Rule (April 2, 2020).

for self-employed individuals who filed (or will file) a 2019 Form 1040 Schedule C.<sup>157</sup> 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.

**a. Use of PPP Funds for Borrowers with Employees**

According to the First Official PPP Interim Final Rule and its later revision, 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.<sup>158</sup> It is also possible—and in some cases, required—to use a PPP loan to refinance an SBA Economic Injury Disaster Loan (EIDL) that was made between January 31, 2020, and April 3, 2020. Details of the EIDL program and the refinancing rules are discussed later in this Guide.<sup>159</sup>

**b. Use of PPP Funds for Self-Employed Borrowers**

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, as defined later in this Guide; (2) employee payroll costs for employees whose principal place of residence is in the United States (if the self-employed individual has employees);<sup>160</sup> (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, and April 3, 2020;<sup>161</sup> and (7) interest on other debts that were incurred before February 15, 2020, though such amounts are not eligible for PPP loan forgiveness.<sup>162</sup>

<sup>157</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747 (April 20, 2020).

<sup>158</sup> CARES Act § 1102(a)(1); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36311 (June 16, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); Initial PPP Interim Final Rule, at 15 (April 2, 2020).

<sup>159</sup> PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36311 (June 16, 2020).

<sup>160</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 20, 2020). 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 20, 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).

<sup>161</sup> 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 20, 2020).

<sup>162</sup> In other words, 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 loan forgiveness. Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 20, 2020).



The rules provide an additional restriction for these self-employed borrowers. SBA is limiting the use of PPP loan proceeds to the types of allowable uses for which the individual made expenditures in 2019.<sup>163</sup> In other words, the only allowable uses of PPP funds will be for those expenses reflected on the borrower's 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.<sup>164</sup>

## **9. Forgiveness and Potential Repayment**

On May 16, 2020, SBA published the first version of the PPP Loan Forgiveness application. Since then, the Flexibility Act became law, and various rules have been published in the Federal Register. They provide more details, and some changes, to PPP loan forgiveness. Below are the main requirements and rules for PPP loan forgiveness.

### ***a. Loan Forgiveness Covered Period***

To receive forgiveness on a PPP loan, the farmer must use PPP funds for eligible purposes during a specific time period that is called the loan forgiveness "covered period."<sup>165</sup> Under the CARES Act, the covered period for PPP loan forgiveness was the eight-week-period following the disbursement of the loan.<sup>166</sup> With the passing of the Flexibility Act, the covered period was extended.<sup>167</sup> At present, the covered period is either: (1) the twenty-four-week period immediately following the disbursement date of the PPP loan; or (2) if the farmer received the loan before June 5, 2020, the borrower can choose to have the covered period be the

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<sup>163</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 20, 2020).

<sup>164</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 2020).

<sup>165</sup> See, for example, CARES Act § 1106(a)-(b); Flexibility Act, § 3(b)(1) (June 5, 2020); PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36998 (June 19, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 2020).

<sup>166</sup> See CARES Act § 1106(a)(3); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33006 (June 1, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 2020). See also 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).

<sup>167</sup> Flexibility Act, § 3(b)(1) (June 5, 2020).

eight-week-period following disbursement of the loan.<sup>168</sup> In no case, however, can the covered period cannot extend beyond December 31, 2020 for any borrower.<sup>169</sup>

SBA also allows borrowers who have a biweekly (or more frequent) payroll to choose to use what SBA calls an “alternative payroll covered period.”<sup>170</sup> Biweekly, for this purpose seems to mean once every two weeks. This alternative payroll covered period allows borrowers to calculate payroll costs by using the twenty-four-week (168 days) period beginning the first day of the first payroll cycle during the covered period. As an example, if a borrower received a PPP loan on April 20, 2020, and the first day of the first pay period following that disbursement date was April 26, 2020, the borrower’s alternative payroll covered period would begin on April 26, 2020 and end on October 10, 2020.<sup>171</sup> Borrowers who received PPP loans prior to June 5, 2020, may choose to use an alternative payroll covered period that represents the eight-week (56 days) period following the first day of the first payroll cycle after the disbursement date, rather than the twenty-four-week period.<sup>172</sup>

### ***b. Payroll Expenses that Qualify for Forgiveness***

The types of payroll expenses that qualify for PPP loan forgiveness will depend on whether the borrower is an employer with employees or a self-employed individual. Because self-employed individuals generally are not on payroll, SBA calls the payroll equivalent for these borrowers “owner compensation replacement.”<sup>173</sup>

#### **(i) Covered Period for Payroll Expenses—Two Options**

As a general rule, PPP loan forgiveness determines eligible payroll expenses based on the expenses incurred during the covered period, as defined above. However, SBA also allows borrowers who have a biweekly

<sup>168</sup> Flexibility Act, § 3(b)(1) (June 5, 2020); PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306-38307 (June 26, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020); PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36998 (June 19, 2020); PPP EZ Loan Forgiveness Application Instructions, Form 3508EZ, Page 2 (June 16, 2020).

<sup>169</sup> Flexibility Act, § 3(b)(1) (June 5, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020); PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020).

<sup>170</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020); PPP Loan Forgiveness Application Instructions, Form 3508, Page 1 (June 16, 2020).

<sup>171</sup> PPP Loan Forgiveness Application Instructions, Form 3508, Page 1 (June 16, 2020).

<sup>172</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020). See also PPP Loan Forgiveness Application Instructions, Form 3508, Page 1 (June 16, 2020); PPP EZ Loan Forgiveness Application Instructions, Form 3508EZ, Page 2 (June 16, 2020); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33006 (June 1, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 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). For an example of calculating payroll costs using the alternative payroll covered period, see PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020).

<sup>173</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020); PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749-21750 (April 20, 2020).

(or more frequent) payroll to choose to use what SBA calls an “alternative payroll covered period” for purposes of loan forgiveness.<sup>174</sup> This alternative payroll covered period allows borrowers to determine their payroll costs that are eligible for forgiveness by using the twenty-four-week (168 day) period beginning the first day of the first payroll cycle during the covered period.

As an example, if a borrower received a PPP loan on April 20, 2020, and the first day of the first pay period following that disbursement date was April 26, 2020, the borrower’s alternative payroll covered period would begin on April 26, 2020, and end on October 10, 2020.<sup>175</sup> Borrowers who received PPP loans prior to June 5, 2020, may instead choose to use an alternative payroll covered period that represents the eight-week (56 days) period following the first day of the first payroll cycle after the disbursement date, rather than the twenty-four-week period.<sup>176</sup> As with the standard covered period, the alternative payroll covered period cannot extend beyond December 31, 2020 for any borrower.<sup>177</sup>

## **(ii) Qualifying Payroll Expenses for Employers with Employees**

PPP loan forgiveness will apply to payroll costs incurred or paid during the loan forgiveness covered period, as defined immediately above.<sup>178</sup>

Lenders are required to make the first PPP loan disbursement no later than ten calendar days from the date the loan was approved.<sup>179</sup> Borrowers, therefore, do not have the option of delaying when the covered period begins so as to capture more payroll costs.

Payroll costs are typically “incurred” on the day the employee’s pay is earned.<sup>180</sup> If employees are not performing work, but are still on their

<sup>174</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020); PPP Loan Forgiveness Application Instructions, Form 3508, Page 1 (June 16, 2020).

<sup>175</sup> PPP Loan Forgiveness Application Instructions, Form 3508, Page 1 (June 16, 2020).

<sup>176</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020). See also PPP Loan Forgiveness Application Instructions, Form 3508, Page 1 (June 16, 2020); PPP EZ Loan Forgiveness Application Instructions, Form 3508EZ, Page 2 (June 16, 2020); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33006 (June 1, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 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). For an example of calculating payroll costs using the alternative payroll covered period, see PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020).

<sup>177</sup> PPP Loan Forgiveness Application Instructions, Form 3508, Page 1 (June 16, 2020).

<sup>178</sup> Flexibility Act, § 3(b)(1) (June 5, 2020); PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306-38307 (June 26, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310-36311 (June 16, 2020); PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020).

<sup>179</sup> Treasury Department, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Question 20 (June 25, 2020).

<sup>180</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306-38307 (June 26, 2020); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33006 (June 1, 2020).

employer's payroll, the payroll costs are incurred based on the schedule established by the employer.<sup>181</sup> Payroll costs that are incurred during the last pay period before the end of the covered period (or alternative covered period) must be paid on or before the next regular payroll date in order to be eligible for forgiveness.

### **(iii) Owner Compensation Replacement for Self-Employed Individuals**

Self-employed individuals who file a Schedule C or a Schedule F, as well as owner-employees, can receive PPP loan forgiveness for what SBA calls "owner compensation replacement."<sup>182</sup> The owner compensation replacement is based on the 2019 net profits, as reported on the borrower's 2019 Schedule C or Schedule F.

For these self-employed borrowers, PPP loan forgiveness is limited in one of two ways.<sup>183</sup>

One rule applies to borrowers that received a PPP loan before June 5, 2020. Those borrowers can choose to have an eight-week covered period. In that case, the maximum forgiveness for owner compensation replacement would be a proportionate eight-week share of 2019 net profits.<sup>184</sup> This amount is capped at 15,385 dollars.

All other borrowers, including borrowers who received a loan before June 5, 2020, but do not choose an eight-week covered period, have a twenty-four-week covered period. Their loan forgiveness for owner compensation replacement is limited to 2.5 months' worth of 2019 net profit. This is capped at 20,833 dollars.<sup>185</sup>

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<sup>181</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020). This would usually be the day the work would have been performed.

<sup>182</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020); PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749-21750 (April 20, 2020).

<sup>183</sup> SBA says that the rationale for the self-employed forgiveness rules is that many self-employed individuals have few overhead expenses that qualify for forgiveness under the Act because they operate out of their homes, vehicles, or sheds, and do not incur qualifying mortgage interest, rent, or utility payments. Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 2020). More recently, SBA has also indicated that this rule is an attempt to prevent self-employed individuals from receiving a windfall under the program that Congress did not intend. See PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020).

<sup>184</sup> As SBA notes, this means 8/52 of 2019 net profits. PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020); PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020). For the rule that was in place before the extension of the covered period to twenty-four weeks under the Flexibility Act, see PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33006 (June 1, 2020); see also Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 2020).

<sup>185</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020); PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020). For the rule that was in place before the extension of the covered period to

These loan forgiveness amounts for owner compensation replacement apply to each owner across all businesses. Also, no additional PPP loan forgiveness is provided for retirement or health insurance contributions by self-employed individuals who file a Schedule C or Schedule F because such expenses are typically paid out of their net self-employment income.<sup>186</sup>

***c. Non-Payroll Expenses that Qualify for Forgiveness***

Three non-payroll expenses qualify for PPP loan forgiveness, so long as they can be deducted on a borrower's Schedule C (or Schedule F, most likely) as a business expense.<sup>187</sup> These are: (1) business rent or lease payments;<sup>188</sup> (2) interest payments on mortgage obligations;<sup>189</sup> and (3) utility payments for electricity, gas, water, transportation, telephone, and internet services.<sup>190</sup> Self-employed borrowers must have claimed (or been entitled to claim) these non-payroll expenses as deductions on their 2019 Schedule C (or Schedule F, most likely) in order to qualify for loan forgiveness.<sup>191</sup>

Eligible non-payroll expenses can be forgiven if they are either paid or incurred during the covered period, as defined above.<sup>192</sup> It appears that non-payroll

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twenty-four weeks under the Flexibility Act, see PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33006 (June 1, 2020); see also Self Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 2020).

<sup>186</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38307 (June 26, 2020); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33006 (June 1, 2020).

<sup>187</sup> PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 2020).

<sup>188</sup> Initial PPP Interim Final Rule, at 13 (April 2, 2020).

<sup>188</sup> Flexibility Act, § 3(b)(2) (June 5, 2020). Rent and lease payments eligible for forgiveness include those for real and personal property, so long as the lease agreement was in force before February 15, 2020. PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020).

<sup>189</sup> Flexibility Act, § 3(b)(2) (June 5, 2020). To qualify for forgiveness, the mortgage obligations—whether for real or personal property—must have been incurred before February 15, 2020. PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020). Advance prepayments of mortgage interest are not eligible for forgiveness. PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020).

<sup>190</sup> Flexibility Act, § 3(b)(2) (June 5, 2020). The utility services must have begun before February 15, 2020 in order to qualify for forgiveness. PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020).

<sup>191</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 20, 2020).

<sup>192</sup> PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36999 (June 19, 2020); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33007 (June 1, 2020).

expenses that are incurred during the covered period must be paid on or before the next regular billing date in order to be eligible for forgiveness.<sup>193</sup>

***d. Principal and Interest are Eligible for Forgiveness***

Both principal and interest on PPP loans are eligible for forgiveness.<sup>194</sup>

***e. Requirements for Receiving Full Loan Forgiveness***

In order to receive full forgiveness of a PPP loan, the following requirements must be followed.

**(i) At Least 60% of Loan Spent on Payroll**

Under the Flexibility Act, in order to receive full loan forgiveness the borrower must use at least 60 percent of the loan proceeds for payroll costs.<sup>195</sup> This means that no more than 40 percent of the loan may be used for nonpayroll costs.<sup>196</sup> So, if the business borrows 10,000 dollars, to have the whole loan forgiven at least 6,000 dollars of the loan would need to go to payroll expenses. Documentation of these expenses will be required when requesting loan forgiveness.<sup>197</sup>

Rules in place prior to the passing of the Flexibility Act required that in order to receive full forgiveness of a PPP loan, the borrower needed to spend at least 75 percent of the loan on payroll costs.<sup>198</sup> Those rules no longer apply.

<sup>193</sup> For an example of determining non-payroll expenses that are eligible for forgiveness, see PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33006-33007 (June 1, 2020).

<sup>194</sup> PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36998 (June 19, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36311 (June 16, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20813 (April 15, 2020); and Initial PPP Interim Final Rule, at 13 (April 2, 2020).

<sup>195</sup> Flexibility Act, § 3(b)(2) (June 5, 2020); PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306 (June 26, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020); PPP Interim Final Rule—Revisions to the Third and Sixth Interim Final Rules, 85 Fed. Reg. 36997, 36998 (June 19, 2020).

<sup>196</sup> Flexibility Act, § 3(b)(2) (June 5, 2020); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36311 (June 16, 2020).

<sup>197</sup> CARES Act § 1106(e); PPP Interim Final Rule—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36311 (June 16, 2020); Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21750 (April 20, 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 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 20, 2020).

<sup>198</sup> PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 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). 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 and require that at least 75 percent of the loan be spent on payroll. Compare CARES Act § 1106(b) with

## **(ii) Wages Remain Within 75 Percent**

In order to receive full PPP loan forgiveness, during the covered or alternative covered period, the borrower must keep the level of payroll wages and salaries within 75 percent of what they were between January 1, 2020, and March 31, 2020, the first quarter of 2020.<sup>199</sup> If wages and salaries decrease more than 25 percent, the borrower's total loan forgiveness amount will be reduced by the dollar amount that exceeds the 25 percent.<sup>200</sup>

## **(iii) Full-Time Equivalent (FTE) Employees Remain the Same**

In order to receive full loan forgiveness, the borrower must keep the same number of full-time staff or their full-time equivalent (FTE) employees<sup>201</sup> during the covered or alternative covered period.<sup>202</sup> To determine whether reductions have occurred, SBA will compare the borrower's number of FTE employees during the borrower's covered period against the FTE employee numbers from what SBA calls the borrower's "reference period."<sup>203</sup> The borrower gets to choose which reference period to use. The choice is between either February 15, 2019 through June 30, 2019, or January 1, 2020 through February 29, 2020.<sup>204</sup> For seasonal employers, the reference period can be either of the two just mentioned, or a

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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).

<sup>199</sup> CARES Act § 1106(d)(3); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33008 (June 1, 2020). For purposes of this rule, a reduction in wages or salaries will only lead to a reduction in loan forgiveness for those reductions that are *not* due to reduced working hours. In other words, if an employee's hourly wage remained the same, but the employee went from working forty hours per week to twenty hours per week, the borrower's loan forgiveness would not be reduced for not maintaining adequate payroll wages; the borrower's loan forgiveness could be reduced, however, if the number of full-time equivalent staff are not maintained. See PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33008-33009 (June 1, 2020).

<sup>200</sup> For example, suppose a borrower reduced an employee's weekly salary from \$1,000 during the first quarter of 2020, to \$700 during the borrower's covered period. This is a reduction of 30 percent. Assuming the employee continued working the same number of hours, the first 25 percent of that reduction—or 250 dollars—would be exempt from any reductions in PPP loan forgiveness. However, the borrower's otherwise-eligible loan forgiveness amount would be reduced by the remaining 50 dollars per week during the covered period. If the borrower has a 24-week covered period, this would amount to a total reduction of 1,200 dollars in the borrower's loan forgiveness amount. See PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38308 (June 26, 2020). For the calculation of PPP loan forgiveness for a borrower that received a PPP loan before June 5, 2020 and elected an eight-week covered period, see PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38308 (June 26, 2020).

<sup>201</sup> Under the rules, a full-time employee is someone who works forty hours per week or more. The rules provide details on how to calculate FTE employees. See PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33008 (June 1, 2020).

<sup>202</sup> CARES Act § 1106(d)(2); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33007-33008 (June 1, 2020).

<sup>203</sup> PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33007 (June 1, 2020). Sometimes SBA refers to this reference period as a "base period." See PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38309 (June 26, 2020).

<sup>204</sup> PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33007 (June 1, 2020).

consecutive twelve-week period between May 1, 2019 and September 15, 2019.

If the borrower does not comply with these requirements, the amount of the loan forgiveness will be reduced by a percentage that represents the same percentage reduction in FTE employees.<sup>205</sup> For example, suppose a borrower had 10.0 FTE during the borrower's selected reference period, but that number declined to 8.0 FTE during the borrower's covered period.<sup>206</sup> That is a reduction in FTE employees of 20 percent, and therefore the borrower would only receive 80 percent of the borrower's otherwise-eligible PPP loan forgiveness.

### ***f. Exemptions to Loan Forgiveness Reductions***

There are four different exemptions to the reduction in loan forgiveness due to changes in FTE employee numbers. Three of these exemptions were created under the Flexibility Act, while the fourth exemption was outlined in the June 1, 2020, PPP Loan Forgiveness Rule.<sup>207</sup>

#### **(i) Employer Tries to Restore Hours**

Under one exemption, loan forgiveness reductions will not be taken if an employer tries to restore an employee's hours and the following four requirements are met.<sup>208</sup> First, the employer must make a good-faith, written offer to restore the employee's hours. Second, the offer made was for the same number of hours earned by the employee right before the reduction in hours. Third, the employee must reject the offer. Fourth, the employer must have kept records of the offer and the employee rejection of the offer.

The requirements for this exception were different under previous PPP loan forgiveness rules.<sup>209</sup>

#### **(ii) Inability to Rehire or Replace Employee**

Loan forgiveness reductions do not apply if there are no other employees available for the employer to hire. For this exemption to apply the following must be true.<sup>210</sup> First, the employer must make a good faith effort to rehire individuals who were employees on February 15, 2020. Second, the employer must make a good faith effort to hire similarly qualified individuals for unfilled positions. Both of these conditions must be met by December 31, 2020. In addition, the employer must be able to

<sup>205</sup> CARES Act § 1106(d); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33008 (June 1, 2020).

<sup>206</sup> PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33008 (June 1, 2020).

<sup>207</sup> Flexibility Act, § 3(b)(2)(B) (June 5, 2020).

<sup>208</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38309 (June 26, 2020).

<sup>209</sup> Flexibility Act, § 3(b)(2)(B) (June 5, 2020); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33007 (June 1, 2020).

<sup>210</sup> Flexibility Act, § 3(b)(2)(B) (June 5, 2020); PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38309 (June 26, 2020).



document the offer and rejection, and the effort to find another employee. The borrower must also inform the applicable state unemployment insurance office of the rejected offer within thirty days of that rejection.

### **(iii) Unable to Return to Business Activity Due to COVID-19 Restrictions**

Loan forgiveness reductions will not be taken if COVID-19 restrictions reduced business activity.<sup>211</sup> For this exemption to apply, the following must be true. First, the borrower must be unable to return to the same business level that the business had on February 15, 2020. Second, the reason for the inability to return to the same level must be that the business could not do so while meeting the requirements or guidance that was set to prevent the spread of COVID-19. The guidance must have been issued between March 1, 2020, and December 31, 2020, and must be related to sanitation, social distancing, worker safety, or customer safety.<sup>212</sup> State and local shutdown orders qualify for this exemption.<sup>213</sup> Third, borrowers will need to certify, in good faith, that they can document that the reduction in business activity was directly—or indirectly—due to complying with this guidance. Documentation for this purpose means copies of the requirements or guidance as well as borrower financial records.

### **(iv) Employees Fired for Cause, Voluntarily Resign, or Ask for Reduction of Hours**

Loan forgiveness reductions will not be taken if an employee is fired for cause, voluntarily resigns, or asks for a reduction of hours.<sup>214</sup> For this exemption to apply, the firing, resignation, or reduced schedule must have occurred during either the covered period or the alternative payroll covered period, as defined above. Borrowers relying on this exemption must keep records showing each employee that was fired for cause, voluntarily resigned, or voluntarily reduced their hours, and must provide those records if requested.<sup>215</sup>

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<sup>211</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38309 (June 26, 2020).

<sup>212</sup> The requirements or guidance should come from the Department of Health and Human Services (HHS), the Center for Disease Control (CDC), or the Occupational Safety and Health Administration (OSHA). PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38309 (June 26, 2020).

<sup>213</sup> The rules explicitly say that local restrictions can meet this requirement because they are an indirect result of the federal guidance. PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38309 (June 26, 2020).

<sup>214</sup> CARES Act § 1106(d)(5); PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33009 (June 1, 2020); Paycheck Protection Program (PPP) Information Sheet: Borrowers, at 3. For additional details on the safe harbor FTE rule, see PPP Loan Forgiveness Application, pages 7-8.

<sup>215</sup> PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33009 (June 1, 2020).

### ***g. FTE Reduction Safe Harbor Rule***

In addition to the various exemptions described above, under the PPP loan forgiveness rules there is what is called a “safe harbor” provision, which provides that any employment or salary reductions made between February 15, 2020, and April 26, 2020, and which are reversed by December 31, 2020, will not be subject to a loan forgiveness reduction.<sup>216</sup>

### ***h. Loan Forgiveness Applications***

A borrower must submit the loan forgiveness application to the lender that is servicing the borrower’s loan.<sup>217</sup> In some cases, a borrower will submit a loan forgiveness application created by SBA. In other cases, a borrower’s lender will have its own forgiveness application that the borrower must use.

There are currently two versions of SBA’s PPP loan forgiveness application available. Both versions, as well as instructions, are available on the SBA website.<sup>218</sup>

The first version is a longer application that requires more details from the borrower. This is the standard PPP Loan Forgiveness Application, known as SBA Form 3508.<sup>219</sup>

The second version, what SBA is calling the “Paycheck Protection Program EZ Loan Forgiveness Application,” is a simplified application for those borrowers that meet certain requirements.<sup>220</sup> This is known as SBA Form 3508EZ. In order to apply for forgiveness using the PPP EZ Loan Forgiveness Application, at least one of the following must be true: (1) you are self-employed with no employees; (2) you did not reduce the hours or annual salary or wages of any employee by more than 25 percent during the covered period and you did not reduce the number of employees or their average hours between January 1, 2020 and the end of the covered period;<sup>221</sup> or (3) you experienced a reduction in your business

<sup>216</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38308-38309 (June 26, 2020); PPP Loan Forgiveness Application Instructions, Form 3508, Page 5 (June 16, 2020). For the previous safe harbor rule, which required borrowers to reverse employment or salary reductions by June 30, 2020, see CARES Act § 1106(d)(5); see also PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33009 (June 1, 2020).

<sup>217</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306 (June 26, 2020).

<sup>218</sup> See <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

<sup>219</sup> The standard PPP Loan Forgiveness Application, Form 3508, is available in both English and Spanish, at: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

<sup>220</sup> See PPP EZ Loan Forgiveness Application, Form 3508EZ (June 16, 2020), at: <https://www.sba.gov/sites/default/files/2020-06/PPP%20Loan%20Forgiveness%20Application%20Form%20EZ%20Instructions%20%28Revised%2006.16.2020%29-508.pdf>. See also PPP EZ Loan Forgiveness Application Instructions, Form 3508EZ, Page 1 (June 16, 2020).

<sup>221</sup> For purposes of the PPP EZ Loan Forgiveness Application, the covered period is either (1) the twenty-four-week period immediately following the disbursement date of the PPP loan; or (2) if the farmer received the loan before June 5, 2020, the borrower can choose to have the covered period be the

due to COVID-19 restrictions, and you did not reduce the annual salary or wages of any employee by more than 25 percent during the covered period.<sup>222</sup>

Lenders may also create their own PPP loan forgiveness applications that mirror the standard or EZ loan forgiveness applications.<sup>223</sup>

### ***i. Documentation Requirements for PPP Loan Forgiveness***

Under the rules for PPP loan forgiveness, there are certain documents that borrowers must submit with their loan forgiveness application, as well as additional documents that borrowers must keep on hand.<sup>224</sup> Borrowers can submit more documentation if they choose.

#### **(i) Documentation that Must be Submitted**

In order to receive PPP loan forgiveness, borrowers must submit documentation to demonstrate payroll expenses, non-payroll expenses, and the number of full-time equivalent (FTE) employees that the borrower had during the applicable period.<sup>225</sup>

In addition, while the rules are not clear, there may be a need for self-employed people to also document some business expenses.<sup>226</sup>

#### **(a) Payroll Documentation**

Borrowers must provide payroll documentation that demonstrates the eligible cash compensation and non-cash benefit payments made to employees during the covered period or alternative covered payroll period.<sup>227</sup> This documentation must include the following: (1) bank account statements or third-party payroll service provider reports that show the amount of cash compensation paid to employees; (2) tax

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eight-week-period following disbursement of the loan. See PPP EZ Loan Forgiveness Application Instructions, Form 3508EZ, Page 2 (June 16, 2020).

<sup>222</sup> For purposes of the PPP EZ Loan Forgiveness Application, the covered period is either (1) the twenty-four-week period immediately following the disbursement date of the PPP loan; or (2) if the farmer received the loan before June 5, 2020, the borrower can choose to have the covered period be the eight-week-period following disbursement of the loan. See PPP EZ Loan Forgiveness Application Instructions, Form 3508EZ, Page 2 (June 16, 2020).

<sup>223</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38309-38310 (June 26, 2020).

<sup>224</sup> First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33009 (June 1, 2020).

<sup>225</sup> CARES Act § 1106(e)-(f); PPP Loan Forgiveness Application Instructions, page 6 (June 16, 2020); PPP EZ Loan Forgiveness Application Instructions, page 4 (June 16, 2020). See also First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33009 (June 1, 2020).

<sup>226</sup> For the perspective of accountants and attorneys working in the area see, R. Prescott Jaunich, PPP Loan Forgiveness for Sole Proprietors, (June 30, 2020), at <https://www.jdsupra.com/legalnews/ppp-loan-forgiveness-for-sole-26406/>, and Owen Yin, Owner Compensation Replacement and Full PPP Forgiveness, Bench (July 22, 2020), at <https://bench.co/blog/operations/owner-compensation-replacement/>.

<sup>227</sup> CARES Act § 1106(e)(1); PPP Loan Forgiveness Application Instructions, page 6 (June 16, 2020); PPP EZ Loan Forgiveness Application Instructions, page 4 (June 16, 2020).

forms for the qualifying covered period or alternative covered payroll period following the PPP loan disbursement date, including payroll tax filings (typically IRS Form 941) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings—third-party payroll service provider equivalents of the tax forms are allowed; (3) payment receipts, cancelled checks, or account statements showing the amount of any employer contributions to health insurance or retirement plans that the borrower is including in the requested PPP loan forgiveness amount.<sup>228</sup>

### **(b) Documentation of Non-Payroll Expenses**

Borrowers must provide documentation to demonstrate the qualifying non-payroll expenses that are eligible for PPP loan forgiveness.<sup>229</sup> To show eligible business mortgage interest payments, borrowers must provide either copies of lender amortization schedules and receipts or cancelled checks from the covered period or lender account statements showing interest and eligible payments from February 2020 and the months of the covered period through one month after the end of that period. To show eligible business rent or lease payments, borrowers must provide either a copy of their current lease agreement and receipts or cancelled checks from the covered period, or lessor account statements from February 2020 and the months of the covered period through one month after the end of that period. Finally, to show eligible business utility payments, borrowers must provide copies of invoices from February 2020 and any payments made during the covered period, as well as receipts, cancelled checks, or account statements verifying those payments.

### **(c) Documentation of FTE Employee Numbers**

For borrowers that submit the standard loan forgiveness application, and not the EZ application, documentation establishing full-time equivalent (FTE) employee numbers must be submitted.<sup>230</sup> Borrowers have a choice as to the specific time period they use for this purpose.<sup>231</sup> The required documentation may include reported payroll tax filings (usually IRS Form 941), and the borrower's state quarterly business and individual employee wage reporting and unemployment insurance tax filings.

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<sup>228</sup> The relevant contributions to health insurance and retirement plans should come from the PPP Loan Forgiveness Application Schedule A, lines 6 and 7. See PPP Loan Forgiveness Application, page 3 (June 16, 2020).

<sup>229</sup> CARES Act § 1106(e)(2); PPP Loan Forgiveness Application, page 10; PPP EZ Loan Forgiveness Application Instructions, page 4 (June 16, 2020).

<sup>230</sup> CARES Act § 1106(e)(1); PPP Loan Forgiveness Application, page 5. Lines 11, 12 and 13 of the standard PPP Loan Forgiveness Application is used to determine whether an FTE reduction is required for the loan forgiveness. Borrowers who submit an EZ loan forgiveness application certify that this does not apply to them.

<sup>231</sup> For the available options, see PPP Loan Forgiveness Application, page 10. The selected time period must be the same period that the borrower selects on the PPP Loan Forgiveness Application, Schedule A, Line 11.

## **(ii) Documentation Borrowers Must Keep**

Borrowers must keep their PPP loan forgiveness documentation, including the PPP Loan Forgiveness Application Schedule A Worksheet, for six years after the date on which the PPP loan is either forgiven or repaid in full.<sup>232</sup> This includes any documentation used to support any of the loan forgiveness reduction exemptions or the safe harbor rule for reversals of employment or salary reductions.<sup>233</sup> Borrowers must also allow representatives of the Office of Inspector General to access the documentation upon request.<sup>234</sup>

### ***j. Decisions on PPP Loan Forgiveness***

In general, it is the borrower's lender that will decide whether the borrower is entitled to PPP loan forgiveness.<sup>235</sup> SBA, however, may review the borrower's PPP eligibility, including the borrower's eligibility for loan forgiveness, at any time if it believes there is reason to do so.<sup>236</sup>

When a borrower submits a completed loan forgiveness application to the lender—whether that be the standard, EZ, or lender-equivalent application—the lender must confirm receipt of the application and the borrower's submitted documentation.<sup>237</sup> The lender must also confirm that the borrower's calculations on the applications are correct.

Following receipt of the loan forgiveness application, the lender has sixty days within which to notify SBA of the lender's decision regarding forgiveness.<sup>238</sup> The lender's decision can conclude one of three things.<sup>239</sup> First, the lender can decide to approve the borrower's PPP loan forgiveness application, either in whole or in

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<sup>232</sup> Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010, 33012 (June 1, 2020); PPP Loan Forgiveness Application, page 6 (June 16, 2020); PPP EZ Loan Forgiveness Application Instructions, page 4 (June 16, 2020).

<sup>233</sup> PPP Loan Forgiveness Application, page 6 (June 16, 2020); PPP EZ Loan Forgiveness Application Instructions, page 4 (June 16, 2020).

<sup>234</sup> PPP Interim Final Rule—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010, 33012 (June 1, 2020); PPP Loan Forgiveness Application, page 7 (June 16, 2020); PPP EZ Loan Forgiveness Application Instructions, page 4 (June 16, 2020).

<sup>235</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306, 38310 (June 26, 2020); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020).

<sup>236</sup> PPP Interim Final Rule—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010, 33012 (June 1, 2020). See also 13 C.F.R. § 120.524(c) (2020).

<sup>237</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306, 38309-38310 (June 26, 2020).

<sup>238</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306, 38310 (June 26, 2020); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020). If SBA has any questions regarding the eligibility of a borrower for the requested loan forgiveness amount, SBA will require the lender to contact the borrower in writing and request additional information, or SBA may contact the borrower directly for that information. See Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010, 33012 (June 1, 2020).

<sup>239</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306, 38310 (June 26, 2020).

part. Second, the lender can deny the borrower's loan forgiveness application. Or, third, the lender can deny the application without prejudice because there is a pending SBA review of the PPP loan for which forgiveness is being sought.<sup>240</sup> Without prejudice, in this case, means that even though the lender made a denial, the real decision on loan forgiveness is in the hands of SBA.

If the lender determines that the borrower is entitled to some or all loan forgiveness, the lender must request the forgivable amount from SBA at the time it notifies SBA of its decision.<sup>241</sup> SBA then has ninety days, from the date the lender issued its decision to SBA, within which to remit the forgiveness amount, plus any accrued interest, to the lender who will then provide the money to the borrower. If the lender denies the loan forgiveness application, the lender must notify the borrower in writing of that decision.<sup>242</sup>

The lender must inform the borrower of its decision as to the amount of loan forgiveness the borrower is eligible to receive.<sup>243</sup> If only a portion of the original PPP loan is determined to be forgivable, the borrower is responsible for repaying the remainder of the loan within the two-year maturity timeframe for the loan. If the borrower had been making payments on the loan, and the amount of forgiveness is more than the outstanding balance on the loan, the lender must provide the full forgiveness, including any amount exceeding the principal balance, to the borrower.

In addition, SBA reserves the right to review whether a borrower has complied with all of the required rules, including those for borrower eligibility, loan amounts and uses of the money, as well as loan forgiveness.<sup>244</sup>

### ***k. Tax Implications of Forgiveness***

The federal income tax consequences of PPP loans are confusing.

First, in general, according to the IRS, debt forgiveness is taxable.<sup>245</sup> There are some exceptions, including one that is specifically for farmers.<sup>246</sup>

<sup>240</sup> If a loan forgiveness application is denied without prejudice, the borrower can request that the lender reconsider the application, so long as SBA does not conclude that the borrower is ineligible for a PPP loan. See PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306, 38310 (June 26, 2020).

<sup>241</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306, 38310 (June 26, 2020).

<sup>242</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306, 38310 (June 26, 2020).

<sup>243</sup> PPP Interim Final Rule—Revisions to Loan Forgiveness, 85 Fed. Reg. 38304, 38306 (June 26, 2020); First PPP Loan Forgiveness Interim Final Rule, 85 Fed. Reg. 33004, 33005 (June 1, 2020).

<sup>244</sup> Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010, 33011-33012 (June 1, 2020).

<sup>245</sup> See IRS, Topic No. 431 Canceled Debt – Is It Taxable or Not, (May 27, 2020), at <https://www.irs.gov/taxtopics/tc431>; IRS, Canceled Debts, Foreclosures, Repossession, and Abandonments (for Individuals), Pub. 4681 (Feb. 7, 2020), at <https://www.irs.gov/pub/irs-pdf/p4681.pdf>.

<sup>246</sup> See IRS, Canceled Debts, Pub. 4681, at 7-8 (Feb. 7, 2020).

Second, the CARES Act made PPP loan forgiveness not taxable under federal income tax laws.<sup>247</sup>

Third, it is not clear whether all forgiveness for the self-employed will fall under the CARES Act rule that made the forgiveness not taxable under federal income tax laws.<sup>248</sup> Neither SBA nor the Treasury has clarified the tax consequences of forgiveness for self-employed individuals. If all debt forgiven is to be not taxed, there may be a need for self-employed individuals to document at least part of their business expenses.

Fourth, state income taxes were not affected by the CARES Act. In other words, if a state has a state income tax, it is possible that PPP loan forgiveness will be taxable by the state.

Finally, the IRS has issued a notice stating that any business that receives a PPP loan will not be able to write off expenses paid with any forgiven portion of the loan, even if those expenses would otherwise be deductible.<sup>249</sup> This means that businesses that typically get deductions for expenses like salaries and wages may not be able to take those deductions if their PPP loan is forgiven.<sup>250</sup>

## 10. Appeals of PPP Loan and Loan Forgiveness Decisions

If SBA ultimately determines that a borrower is ineligible for a PPP loan, or for loan forgiveness, the borrower may appeal SBA's decision.<sup>251</sup> Although SBA has said it intends to issue a separate rule describing this appeals process, this rule has not been published as of July 28, 2020. Applicants should keep all of their records in case there is an appeal.

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<sup>247</sup> CARES Act § 1106(i). This rule only applies to federal income tax—state tax laws may differ.

<sup>248</sup> For the perspective of accountants and attorneys working in the area see, R. Prescott Jaunich, PPP Loan Forgiveness for Sole Proprietors, (June 30, 2020), at <https://www.jdsupra.com/legalnews/ppp-loan-forgiveness-for-sole-26406/>, and Owen Yin, Owner Compensation Replacement and Full PPP Forgiveness, Bench (July 22, 2020), at <https://bench.co/blog/operations/owner-compensation-replacement/>.

<sup>249</sup> Internal Revenue Service, Notice 2020-32, page 6, at: <https://www.irs.gov/pub/irs-drop/n-20-32.pdf>.

<sup>250</sup> For journalism on the tax implications of PPP, see Kimberly Gilreath et al, Tax Effects of PPP Loan Forgiveness—IRS Notice 2020-32 (May 5, 2020), at: <https://www.jdsupra.com/legalnews/tax-effects-of-ppp-loan-forgiveness-irs-72682/>; Sally P. Schreiber, AIPA Challenging Deductibility of PPP Related Expenses, Journal of Accountancy (May 1, 2020), at <https://www.journalofaccountancy.com/news/2020/may/expenses-reimbursed-by-ppp-not-tax-deductible-paycheck-protection-program.html>; Wilson Elser, Paycheck Protection Program: Certain Issues Involving Loan Forgiveness, The National Law Review (May 15, 2020), at <https://www.natlawreview.com/article/paycheck-protection-program-certain-tax-issues-involving-loan-forgiveness>.

<sup>251</sup> Business Loan Program Temporary Changes; Paycheck Protection Program—SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010, 33012 (June 1, 2020).



### C. Economic Injury Disaster Loan (EIDL) Program

The CARES Act made additional money available through what is known as the COVID-19 Economic Injury Disaster Loan (“EIDL”) program.<sup>252</sup> 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.<sup>253</sup>

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.”<sup>254</sup>

SBA has released very little in the way of rules for how the COVID-19 EIDL program works. 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.<sup>255</sup> These changes are discussed in more detail below.

#### 1. Funding for EIDL

The CARES Act originally appropriated 562 million dollars to the COVID-19 EIDL program and ten billion dollars towards EIDL Emergency Advances.<sup>256</sup> That funding, however, ran out by mid-April 2020.<sup>257</sup> Additional funding was appropriated on April 24, 2020, when the Enhancement Act became law. Among other things, the Enhancement Act allocated 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.<sup>258</sup>

<sup>252</sup> 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).

<sup>253</sup> CARES Act § 1110; Enhancement Act, § 101(b) (April 24, 2020).

<sup>254</sup> 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>.

<sup>255</sup> Enhancement Act, Division A—Small Business Programs, § 101(a)(c) (April 24, 2020).

<sup>256</sup> 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.

<sup>257</sup> 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>.

<sup>258</sup> 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.<sup>259</sup> SBA stopped accepting new EIDL applications when the original CARES Act funding ran out.<sup>260</sup> Shortly after the passing of the Enhancement Act, however, SBA began allowing new EIDL applications, but only for agricultural businesses. The eligibility of agricultural businesses for the EIDL program is described in more detail in the next section. As of June 15, 2020, SBA began accepting new EIDL applications from all eligible small businesses, agricultural and otherwise.

The deadline to apply for COVID-19 EIDL assistance is December 31, 2020.<sup>261</sup>

## 3. Eligible Businesses for EIDL Program—Include Agricultural Enterprises

COVID-19 EIDL program loans and advances are available to a wide variety of businesses that have suffered substantial economic injury.<sup>262</sup> 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.<sup>263</sup>

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.<sup>264</sup> “Agricultural enterprises” include “small business concerns engaged in the production

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<sup>259</sup> 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.

<sup>260</sup> 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>.

<sup>261</sup> 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).

<sup>262</sup> CARES Act § 1110(a)-(b); 15 U.S.C. § 636(b)(3)(A)(iii).

<sup>263</sup> 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 nurse. 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.

<sup>264</sup> 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.

of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural-related industries.”<sup>265</sup>

Eligible businesses for COVID-19 EIDL assistance include small businesses, tribal small business concerns,<sup>266</sup> employee stock ownership plans (ESOPs), and now, agricultural enterprises, so long as each business has fewer than 500 employees.<sup>267</sup> In some cases, businesses with more than 500 employees may be eligible for an EIDL program loan.<sup>268</sup> In addition, small business concerns,<sup>269</sup> private nonprofit organizations, and small agricultural cooperatives are also eligible, as are sole proprietorships and independent contractors.<sup>270</sup>

#### 4. EIDL Program Loan Eligibility Rules

To be eligible for a COVID-19 EIDL program loan, the business must have been in operation on January 31, 2020.<sup>271</sup> The business must also have suffered a “substantial economic injury.”<sup>272</sup> A substantial economic injury means the business has suffered economic harm such that it is unable to do at least one of the following three things: (1) meet obligations as they come due; (2) pay ordinary and necessary operating expenses; or (3) market, produce, or provide a product or service that is normally marketed, produced, or provided.<sup>273</sup>

#### 5. EIDL Program Loan Amount and Terms

When the COVID-19 EIDL program was first rolled out, the maximum loan amount was two million dollars.<sup>274</sup> Journalists have reported that SBA limits EIDL program loans to 150,000 dollars.<sup>275</sup> SBA has not released anything official to confirm this

<sup>265</sup> 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).

<sup>266</sup> 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).

<sup>267</sup> CARES Act § 1110(a)(2); Enhancement Act, § 101(c).

<sup>268</sup> 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).

<sup>269</sup> 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.

<sup>270</sup> CARES Act § 1110(a)-(b).

<sup>271</sup> CARES Act § 1110(c)(2).

<sup>272</sup> CARES Act § 1110(a)-(b); 15 U.S.C. § 636(b)(3)(A)(iii).

<sup>273</sup> 15 U.S.C. § 636(b)(3)(A)(iii).

<sup>274</sup> 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>.

<sup>275</sup> See, Washington Post, “SBA Slashes Disaster-Loan Limit from \$2 Million to \$150,000, Shuts Out Nearly All New Applicants (May 7, 2020), at: <https://www.washingtonpost.com/business/2020/05/07/sba-disaster-loans/>.

change. The loans have a 3.75 percent interest rate for up to thirty years.<sup>276</sup> The interest rate for nonprofits is 2.75 percent.

For COVID-19 EIDL program loans, some of SBA's rules for its traditional EIDL loans have been relaxed. No personal guarantees are required for loans up to 200,000 dollars that are made between January 31, 2020, and December 31, 2020, and the requirement that a business be in operation for the one year prior to the disaster has been waived.<sup>277</sup> In addition, a business does not need to show that it is unable to obtain credit elsewhere, and SBA may approve the loan based solely on a credit score or on other "alternative appropriate methods."<sup>278</sup> Tax returns are not required. As with traditional EIDL loans, no collateral is required for loans up to 25,000 dollars.<sup>279</sup>

The eligibility rules for the COVID-19 EIDL program apply to EIDL program loans made between January 31, 2020, and December 31, 2020.<sup>280</sup>

Funds from a COVID-19 EIDL program loan may be used for necessary working capital, including to pay fixed business debts, payroll costs, accounts payable, and other bills that cannot be paid due to the impact of COVID-19.<sup>281</sup>

EIDL program loan funds may not be used for any of the following purposes: (1) repair physical damage; (2) refinance debt which was occurred prior to the COVID-19 pandemic; (3) pay dividends or other disbursements to owners, partners, stockholders, or officers; or (4) pay other loans owned by a federal agency, including other SBA loans and USDA loans administered through FSA.<sup>282</sup>

## **6. EIDL Emergency Advances—Funding Ran Out as of July 11, 2020**

Up until July 11, 2020, COVID-19 EIDL applicants, which include agricultural enterprises, could request that SBA give them an advance on the loan of up to 10,000 dollars.<sup>283</sup> In actuality, journalists and others reported that SBA was only providing emergency advances of one thousand dollars per employee.<sup>284</sup> Associate Administrator of the SBA, James Rivera, confirmed the one-thousand-per-employee limit on the advances at a July 1, 2020 hearing before the House Committee on Small Business.<sup>285</sup>

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<sup>276</sup> See SBA, SBA Disaster Assistance in Response to the Coronavirus, at: <https://www.sba.gov/disaster-assistance/coronavirus-covid-19>.

<sup>277</sup> CARES Act § 1110(a)(1), (c). However, to be eligible for a COVID-19 EIDL program loan the business must have been in operation on January 31, 2020.

<sup>278</sup> CARES Act § 1110(c)(3), (d).

<sup>279</sup> 13 C.F.R. § 123.11(a) (2020).

<sup>280</sup> CARES Act § 1110(a)(1).

<sup>281</sup> See 13 C.F.R. § 123.303(a) (2020); see also SBA, SBA Disaster Assistance in Response to the Coronavirus, at: <https://www.sba.gov/disaster-assistance/coronavirus-covid-19>.

<sup>282</sup> 13 C.F.R. § 123.303(b) (2020).

<sup>283</sup> CARES Act § 1110(e)(3); Enhancement Act, § 101(c).

<sup>284</sup> See, for example, Congressional Research Service (CRS), "COVID-19 Relief Assistance to Small Businesses: Issues and Policy Options," 10 (May 19, 2020).

<sup>285</sup> See Statement of James Rivera, Associate Administrator, Office of Disaster Assistance, U.S. Small Business Administration before the House Committee on Small Business, Hearing on "The Economic Injury Disaster Loan Program: Status Update from the Administration" (July 1, 2020), at: [https://smallbusiness.house.gov/uploadedfiles/07-01-20\\_mr\\_rivera\\_testimony.pdf](https://smallbusiness.house.gov/uploadedfiles/07-01-20_mr_rivera_testimony.pdf).

In a July 11, 2020 press release, however, SBA announced that the 20 billion dollars in funding for the EIDL Emergency Advances had been exhausted, and therefore SBA would no longer be making emergency advances to EIDL loan applicants.<sup>286</sup> The CARES Act allows EIDL emergency advances to be made until December 31, 2020.<sup>287</sup> It is possible more grants could be made if more money was made available for the program.

For those who already applied for an EIDL loan and emergency advance, and in case additional funding were to be allocated for this program, the following provides a brief overview of how the EIDL Emergency Advances work: If an emergency advance is approved, the money is supposed to arrive within three days.<sup>288</sup> The advance can only be used to pay certain things, including: (1) paying sick leave for employees who are unable to work due to COVID-19; (2) maintaining payroll; (3) meeting increased costs of materials due to COVID-19's impact on the supply chain; (4) making rent or mortgage payments; and (5) paying existing debts.<sup>289</sup> Business are not required to repay this money.<sup>290</sup> This is true even if the business is not ultimately approved for the COVID-19 EIDL program loan.

## **7. Tax Implications of EIDL Program Loan and Emergency Advances**

Unlike for the PPP, the CARES Act does not provide any specific rules on the federal income tax implications of receiving a COVID-19 EIDL program loan or emergency advance. Because an EIDL loan must be repaid, it seems likely that the amount of the loan would not be taxed as gross income.<sup>291</sup> Neither SBA nor the Treasury Department has issued any guidance as to how the EIDL emergency advances, or loans, will be treated under federal tax laws.

## **8. Appeals of EIDL Decisions**

The SBA has an appeals system for decisions made by the agency.<sup>292</sup> The system is fairly narrow to begin with, and only certain kinds of decision can be appealed. It is not clear whether EIDL will be subject to this appeals system.

### **D. Applying for Both PPP and the COVID-19 EIDL Program**

Eligible businesses, including agricultural businesses, may receive both PPP loans as well as COVID-19 EIDL program loans and advances. However, there are some restrictions.

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<sup>286</sup> SBA Press Release, SBA Provided \$20 Billion to Small Businesses and Non-Profits Through the Economic Injury Disaster Loan Program (July 11, 2020), at: <https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisoris/sba-provided-20-billion-small-businesses-and-non-profits-through-economic-injury-disaster-loan>.

<sup>287</sup> CARES Act § 1110(e)(8).

<sup>288</sup> CARES Act § 1110(e)(1)-(3).

<sup>289</sup> CARES Act § 1110(e)(4).

<sup>290</sup> CARES Act § 1110(e)(5).

<sup>291</sup> For a discussion of standard EIDL loans see IRS, Casualty Loss With an SBA Loan (April 2013), at: <https://www.irs.gov/businesses/small-businesses-self-employed/casualty-loss-with-an-sba-loan>.

<sup>292</sup> 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).

## 1. PPP and EIDL Program Loans

The rules for the interaction between PPP and EIDL hinge in part on when the EIDL loan was made. The main question concerns using PPP loans to refinance EIDL loans.

The rules on refinancing an EIDL loan can be confusing.

### *a. EIDL Before January 31, 2020*

If a borrower received EIDL loan funds before January 31, 2020, a PPP loan may not be used to refinance an EIDL program loan.<sup>293</sup>

### *b. EIDL From January 31, 2020, Through April 3, 2020*

When applying for a PPP loan, the PPP borrower must certify that if a borrower received EIDL loan funds between January 31, 2020, and April 3, 2020, the EIDL loan was not used for payroll costs or other uses that are allowed for a PPP loan.<sup>294</sup>

At the same time, however, SBA rules seem to assume that some people will have used the EIDL loan for payroll costs. According to these rules, if a PPP borrower also got an EIDL between January 31, 2020, and April 3, 2020, there are two possibilities.

First, if the EIDL loan was used for payroll costs, the PPP loan must be used to refinance the full amount of the EIDL loan.<sup>295</sup> So, while the application certification for a PPP loan says the EIDL was not used for payroll costs, the SBA rules say that if the EIDL loan was used for payroll costs, the PPP must be used to refinance the EIDL.

Second, if the EIDL loan was used for something other than payroll costs, the PPP loan can be used to refinance the EIDL, but a refinance is not required.<sup>296</sup>

### *c. EIDL After April 3, 2020*

If the EIDL loan was made after April 3, 2020, a PPP loan may not be used to refinance an EIDL.<sup>297</sup>

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<sup>293</sup> SBA Procedural Notice, Refinance of EIDL Loans with PPP Loan Proceeds and Lender Remittance of EIDL Refinance Proceeds to SBA, NO. 5000-20032 (June 19, 2020), at: <https://www.sba.gov/sites/default/files/2020-06/5000-20032-508.pdf>.

<sup>294</sup> PPP Borrower Application Form, at 2. Section 7(b)(2) of the Small Business Act is the EIDL program. This provision appears in the Application Form that was revised as of June 24, 2020.

<sup>295</sup> Self-Employed PPP Interim Final Rule, 85 Fed. Reg. 21747, 21749 (April 20, 2020); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20814 (April 15, 2020); SBA Procedural Notice, Refinance of EIDL Loans with PPP Loan Proceeds and Lender Remittance of EIDL Refinance Proceeds to SBA, NO. 5000-20032 (June 19, 2020).

<sup>296</sup> CARES Act § 1102(a)(2); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20814 (April 15, 2020); SBA Procedural Notice, Refinance of EIDL Loans with PPP Loan Proceeds and Lender Remittance of EIDL Refinance Proceeds to SBA, NO. 5000-20032 (June 19, 2020).

<sup>297</sup> SBA Procedural Notice, Refinance of EIDL Loans with PPP Loan Proceeds and Lender Remittance of EIDL Refinance Proceeds to SBA, NO. 5000-20032 (June 19, 2020).

## 2. PPP Loans and EIDL Emergency Advances

If a borrower receives both a PPP loan and an EIDL emergency advance, the forgivable portion of the PPP loan will be reduced by the amount of the emergency advance.<sup>298</sup> If an EIDL program loan is refinanced using a PPP loan, the refinancing will not include any amounts received as an emergency advance because the advance is not actually a loan and does not need to be repaid.

### E. Discrimination in PPP and EIDL

Little thought appears to have been given to the possibility that the PPP or EIDL programs might be implemented in a discriminatory way, or to how that discrimination might be prevented and remedied.<sup>299</sup> The CARES Act, for example, does not give an indication of what anti-discrimination laws might apply PPP or EIDL. It is important to remember, though, that other laws make it illegal for the government or lenders to discriminate when administering these programs.<sup>300</sup>

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<sup>298</sup> CARES Act § 1110(e)(6); First Official PPP Interim Final Rule, 85 Fed. Reg. 20811, 20814 (April 15, 2020). See also Paycheck Protection Program Loan Forgiveness Application Instructions for Borrowers, 2, at: <https://www.sba.gov/document/sba-form--paycheck-protection-program-loan-forgiveness-application>.

<sup>299</sup> One exception that concerns SBA programs is Congressional Research Service, Applicability of Federal Civil rights Laws to Recipients of CARES Act Loans, Legal Sidebar no. 10458 (May 1, 2020), at: <https://crsreports.congress.gov/product/pdf/LSB/LSB10459>.

<sup>300</sup> 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>.



## Chapter Four: The CARES Act Unemployment Insurance

The CARES Act includes a number of changes to unemployment insurance.<sup>301</sup>

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.<sup>302</sup> 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.<sup>303</sup>

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 also created rules based on the CARES Act to administer the changes, and they have issued Unemployment Insurance Program Letters that set out the CARES Act rules for unemployment.<sup>304</sup>

There are many unemployment provisions within the CARES Act.<sup>305</sup> 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

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<sup>301</sup> See generally, CARES Act, Title II, Subtitle A, Section 2101-2116.

<sup>302</sup> 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>. See, as well, Congressional Research Service, *Unemployment Insurance: Legislative Issues in the 116<sup>th</sup> Congress* (July 23, 2020), at <https://fas.org/sgp/crs/misc/R45478.pdf>.

<sup>303</sup> Department of Labor, *Where Do I File for Unemployment Insurance*, at: <https://www.dol.gov/coronavirus/unemployment-insurance#find-state-unemployment-insurance-contacts>.

<sup>304</sup> See 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.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf); Department of Labor, *Unemployment Insurance Program Letter, UL No. 16-20, Change 2*, (July 21, 2020), at: [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_16-20\\_Change\\_2.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_2.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](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](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](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=8634).

<sup>305</sup> See generally, CARES Act, Title II, Subtitle A, Section 2101-2116.

unemployment.<sup>306</sup> Second, the CARES Act effectively increases the number of weeks that a person may receive unemployment to thirty-nine weeks.<sup>307</sup>

## **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.<sup>308</sup> 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.<sup>309</sup> PUA benefits last for up to thirty-nine weeks.<sup>310</sup>

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.<sup>311</sup> DUA is available during a disaster and makes that assistance available to those that are self-employed.<sup>312</sup> For purposes of DUA, self-employed individuals include farmers.<sup>313</sup> 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.”<sup>314</sup> 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.

<sup>306</sup> 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.

<sup>307</sup> 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](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.

<sup>308</sup> CARES Act § 2102; DOL Letter No. 16-20, at 1-2

<sup>309</sup> CARES Act § 2102(a)(3)(A)(ii)(II); DOL Letter No. 14-20, at 3.

<sup>310</sup> CARES Act § 2102(c)(2); DOL Letter No. 16-20, at 3.

<sup>311</sup> DOL Letter No. 14-20, at 3.

<sup>312</sup> 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>.

<sup>313</sup> 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/>.

<sup>314</sup> 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.<sup>315</sup>

In addition, the individual must be unemployed, partially unemployed, or unable or unavailable to work for reasons related to COVID-19.<sup>316</sup>

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.<sup>317</sup> 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.”<sup>318</sup> States can use other qualifying circumstances, but they must be consistent with the examples below.<sup>319</sup> Some states have said directly that farmers are eligible.<sup>320</sup>

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.<sup>321</sup> 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.<sup>322</sup> 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.<sup>323</sup>

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<sup>315</sup> CARES Act § 2102(a)(3)(A)(i). For the rules of the Pandemic Emergency Unemployment Compensation program, see CARES Act § 2107.

<sup>316</sup> CARES Act § 2102(a)(3)(A)(ii)(I); DOL Letter No. 14-20, at 3.

<sup>317</sup> CARES Act § 2102(a)(3)(A)(ii)(I); DOL Letter No. 16-20, at I-3 to I-6.

<sup>318</sup> DOL Letter No. 16-20, at I-3 to I-4.

<sup>319</sup> DOL Letter No. 16-20, at I-4.

<sup>320</sup> See, for example, Wisconsin DWD, Pandemic Unemployment Assistance (PUA) (July 9, 2020), at <https://dwd.wisconsin.gov/dwd/publications/ui/pua-18774-p.pdf>.

<sup>321</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(kk).

<sup>322</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(aa); DOL Letter No. 16-20, at 3.

<sup>323</sup> DOL Letter No. 16-20, at I-4.

## **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.<sup>324</sup>

## **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.<sup>325</sup> 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.<sup>326</sup>

## **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.<sup>327</sup>

## **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.<sup>328</sup> 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.<sup>329</sup>

## **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.<sup>330</sup>

## **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.<sup>331</sup>

<sup>324</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(bb)-(cc); DOL Letter No. 16-20, at 3, I-4.

<sup>325</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(cc); DOL Letter No. 16-20, at 3, I-4.

<sup>326</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(dd); DOL Letter No. 16-20, at 3, I-4.

<sup>327</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(ee); DOL Letter No. 16-20, at 3, I-4.

<sup>328</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(ee)-(ff); DOL Letter No. 16-20, at 3, I-4.

<sup>329</sup> DOL Letter No. 16-20, at I-5.

<sup>330</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(hh); DOL Letter No. 16-20, at 3, I-5.

<sup>331</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(jj); DOL Letter No. 16-20, at 3, I-6.

## 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.<sup>332</sup> 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.

## 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.<sup>333</sup>

## 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.<sup>334</sup>

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.<sup>335</sup> 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. In a further clarification, the Department of Labor confirmed that this is only one example of when an independent contractor can be eligible for PUA, and confirmed it applies for an independent contractor that experiences a “significant diminution of work as a result of COVID-19.”<sup>336</sup>

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.<sup>337</sup> 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,

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<sup>332</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(ii); DOL Letter No. 16-20, at 3, I-6.

<sup>333</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(gg); DOL Letter No. 16-20, at 3, I-5.

<sup>334</sup> CARES Act § 2102(a)(3)(A)(ii)(I)(kk); DOL Letter No. 16-20, at I-6.

<sup>335</sup> DOL Letter No. 16-20, at I-6.

<sup>336</sup> DOL Letter No. 16-20, at I-6; Department of Labor, Unemployment Insurance Program Letter, UL No. 16-20, Change 1, at I-11 (April 27, 2020), at [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_16-20\\_Change\\_1.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_1.pdf).

<sup>337</sup> 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.

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.

**D. End of Availability: December 31, 2020**

The PUA provides benefits for up to thirty-nine weeks.<sup>338</sup> The benefits are available retroactively for weeks of unemployment beginning on or after January 27, 2020. The benefits are available through December 31, 2020.

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<sup>338</sup> DOL, Frequently Asked Questions, "I am an independent contractor. Am I eligible for unemployment benefits under the CARES Act?" at: <https://www.dol.gov/coronavirus/unemployment-insurance>.

## 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.<sup>339</sup> 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.<sup>340</sup> 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;<sup>341</sup> (2) guaranteed or insured by the Department of Veterans Affairs;<sup>342</sup> (3) guaranteed under the Housing and Community Development Act;<sup>343</sup> or (4) made, guaranteed, or insured by the Department of Agriculture.<sup>344</sup>

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<sup>339</sup> An excellent summary of how the mortgage protection in the CARES Act works is the Consumer Financial Protection Bureau, Learn About Mortgage Relief Options and Protections, (July 9, 2020), at: <https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/mortgage-relief/>.

<sup>340</sup> CARES Act § 4022(a)(2).

<sup>341</sup> 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.

<sup>342</sup> CARES Act § 4022(a)(2)(D).

<sup>343</sup> 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.

<sup>344</sup> 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.<sup>345</sup> Nearly half of the mortgages in the country are backed by either Fannie Mae or Freddie Mac.<sup>346</sup>

There are ways to find out if a loan is federally backed. The first step is to call the people who service the loan.<sup>347</sup> According to the federal Consumer Financial Protection Bureau, the servicer has an obligation to help people find out who holds or backs a 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.<sup>348</sup> 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.<sup>349</sup> 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.<sup>350</sup> 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.<sup>351</sup> 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.<sup>352</sup>

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<sup>345</sup> 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.

<sup>346</sup> See Consumer Financial Protection Bureau, Learn About Mortgage Relief Options and Protections, (July 9, 2020), at: <https://www.consumerfinance.gov/about-us/blog/guide-coronavirus-mortgage-relief-options/>.

<sup>347</sup> A website for the Consumer Financial Protection Bureau provides links to the relevant federal agencies and entities. See Consumer Financial Protection Bureau, Request Forbearance or Mortgage Relief, (July 9, 2020), at: <https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/request-forbearance-or-mortgage-relief/>.

<sup>348</sup> CARES Act § 4022(a)(2). The lien can either be a first lien or a subordinate lien.

<sup>349</sup> CARES Act § 4022(b)-(c).

<sup>350</sup> CARES Act § 4022(b)(1).

<sup>351</sup> CARES Act § 4022(b)(2).

<sup>352</sup> CARES Act § 4022(b)(3).

It is not clear from the statute what happens after the forbearance ends.<sup>353</sup> In theory, the lender could change the mortgage to forgive the skipped payments. Lenders might also want the skipped payments to be repaid in a lump sum, or might allow the payments over time.

## **2. Foreclosure Moratorium—Extended Until August 31, 2020**

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 order to sell the property, or execute a foreclosure-related eviction or foreclosure sale.<sup>354</sup> Under the CARES Act, the foreclosure moratorium was to be in place for not less than a sixty days beginning on March 18, 2020. That means it expired on May 17, 2020.

Although the CARES Act foreclosure moratorium has expired, the federal backers of loans have issued guidelines that extend the moratorium.<sup>355</sup> The moratorium has been extended to August 31, 2020 by FHFA, Fannie Mae, Freddie, Mac, FHA, VA, and USDA (rural housing).<sup>356</sup>

### **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.<sup>357</sup> 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

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<sup>353</sup> For a general discussion, see Congressional Research Service, Mortgage Provisions in the Coronavirus AID, Relief, and Economic Security (CARES) Act, IN11224, at 3 (April 14, 2020), at <https://crsreports.congress.gov/product/pdf/IN/IN11334>.

<sup>354</sup> CARES Act § 4022(c)(2).

<sup>355</sup> See National Consumer Law Center, Major Consumer Protection in Response to COVID-19 (June 17, 2020), at <https://library.nclc.org/major-consumer-protections-announced-response-covid-19>.

<sup>356</sup> For the Fannie Mae, Freddie Mac, HUD, USDA, and VA moratoria extension to August 31, 2020, see FHFA Extends Mortgage and Eviction Moratorium (June 17, 2020), at [https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-Eviction-Moratorium-6172020.aspx?utm\\_medium=email&utm\\_source=govdelivery](https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-Eviction-Moratorium-6172020.aspx?utm_medium=email&utm_source=govdelivery); Freddie Mac, Bulletin 2020-25 (June 14, 2020), at <https://guide.freddiemac.com/app/guide/bulletin/2020-25>; Fannie Mae, Lender Letter LL-2020-02, at 9 (July 15, 2020), at <https://singlefamily.fanniemae.com/media/22261/display>; HUD Mortgagee Letter 2020-19 (June 17, 2020), at <https://www.hud.gov/sites/dfiles/OCHCO/documents/2020-19hsngml.pdf>; USDA Stakeholder Announcement (June 23, 2020), at [https://www.rd.usda.gov/sites/default/files/USDA\\_RD\\_AnnouncesExtension\\_ForeclosureEvictionReliefDIRECTO6232020.pdf](https://www.rd.usda.gov/sites/default/files/USDA_RD_AnnouncesExtension_ForeclosureEvictionReliefDIRECTO6232020.pdf); VA Circular 26-20-22 (June 17, 2020), at [https://www.benefits.va.gov/HOMELOANS/documents/circulars/26\\_20\\_22.pdf](https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_20_22.pdf).

<sup>357</sup> CARES Act § 4022(a)(2). The lien can either be a first lien or a subordinate lien.



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.<sup>358</sup>

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.<sup>359</sup> This would benefit many farmers.

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<sup>358</sup> 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](https://www.rd.usda.gov/files/USDA_RD_SA_COVID19_ProgramImmediateActions.pdf).

<sup>359</sup> 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: Coronavirus Food Assistance Program (CFAP)

FLAG wrote a Farmers' Guide to CFAP that was published on May 29, 2020. When more details of the program were released, including a number of important changes to the program, FLAG released a Second Edition of the Farmers' Guide to CFAP on June 17, 2020. That Second Edition is now available online at the FLAG website and can be found here: <http://www.flaginc.org/covid-19-guide/>.

As a result, the Third Edition of this Guide has only the briefest description of CFAP, along with mention of the recent changes to the program.

### A. Overview of USDA Coronavirus Food Assistance Program (CFAP)

On April 17, 2020, USDA announced how some of the CARES Act money would be spent—through a program it is calling the Coronavirus Food Assistance Program (CFAP).<sup>360</sup>

Under the umbrella of CFAP are two separate programs. One program provides direct support to eligible farmers. Under a second program, called the Farmers to Families Food Box Program, the government will contract with distributors to provide food boxes to eligible nonprofits and government entities.

### B. CFAP Direct Support for Farmers

Under CFAP, USDA will spend up to sixteen billion dollars in direct support for farmers.<sup>361</sup> In theory, the support is based on actual losses for agricultural producers where prices and market supply chains have been affected by COVID-19. In addition, USDA provides farmers with funds for what adjustment and marketing costs that have resulted from lost demand and short-term oversupplies for 2020 that were caused by COVID-19.

In practice, CFAP requires the farmer to be eligible. That means, among other things, that the farmer must have an interest in a farm commodity that is eligible under the program.<sup>362</sup> USDA has decided that there are a number of eligible commodities, including dairy, wool, and some livestock.<sup>363</sup> A number of crops are eligible, as are a number of specialty crops. A new rule published on July 10, 2020 introduces additional eligible

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<sup>360</sup> 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>.

<sup>361</sup> Coronavirus Food Assistance Program, CFAP Rule, 85 Fed. Reg. 30825, 30829, 30834, Final Rule (May 21, 2020) (prefatory comments) (to be codified at 7 C.F.R. § 9.5(k)), at: <https://www.govinfo.gov/content/pkg/FR-2020-05-21/pdf/2020-11025.pdf>; Press Release, USDA Announces Coronavirus Food Assistance Program (April 17, 2020); USDA, Coronavirus Food Assistance Program FAQ, “Many sources indicate the impact of COVID-19 on American agriculture will surpass \$40 billion. Why didn’t USDA provide more money to assist producers?” (July 21, 2020), at: <https://www.farmers.gov/cfap/faq>.

<sup>362</sup> CFAP Rule, 85 Fed. Reg. 30825, 30831 (May 21, 2020) (to be codified at 7 C.F.R. § 9.2, “Producer”); CFAP Handbook, page 2-1, para. 15.A (June 24, 2020).

<sup>363</sup> CFAP Handbook, page 2-12, para. 21.A (June 24, 2020).

commodities for the program.<sup>364</sup> A number of common crops, however, are not eligible.<sup>365</sup> Poultry also is not eligible.<sup>366</sup>

If the farmer raised an eligible crop, the farmer makes an appointment with USDA, fills out a set of forms and a CFAP application.<sup>367</sup> USDA calculations then are used to decide if the farmer will receive a CFAP payment, and if so, how much.<sup>368</sup>

### C. CFAP Farmers to Families Food Box Program

Under CFAP, USDA will purchase about three billion dollars of fresh produce, dairy, and meat that are then distributed to eligible food banks, community and faith-based organizations, and other nonprofits. This program is called the Farmers to Families Food Box Program (Food Box Program), and it is being administered through USDA's Agricultural Marketing Service (AMS).<sup>369</sup>

There are three main steps in terms of how the Food Box Program operates.<sup>370</sup> First, the U.S. government makes purchases of fresh fruits and vegetables, dairy, and meat directly from farmers and regional distributors with whom the government will contract. To do this, AMS issues Requests for Proposals (RFPs) from the farmers and distributors.<sup>371</sup> Second, food boxes must be assembled. And finally, the food boxes will be distributed to eligible recipients.

To date, AMS has issued three different rounds of RFPs from food distributors. In the first round of contracts, for the period between May 15, 2020, and June 30, 2020, the government awarded roughly 1.2 billion dollars to local and regional distributors, and 35.5 million food boxes were invoiced.<sup>372</sup> According to AMS, the second round of the contracts will be for the period between July 1, 2020, and August 31, 2020, with the goal of awarding up to 1.47 billion dollars to food distributors. A third round of contracts was announced on July 24, 2020, for food box distributions between September 1, 2020, and October 31,

<sup>364</sup> Notice of Funding Availability; Coronavirus Food Assistance Program (CFAP) Additional Eligible Commodities, Interim Final Rule, 85 Fed. Reg. 41321 (July 10, 2020) (to be codified at 7 C.F.R. pt. 9), at: <https://www.govinfo.gov/content/pkg/FR-2020-07-10/pdf/2020-14854.pdf>.

<sup>365</sup> See USDA, Coronavirus Food Assistance Program, What Commodities are Ineligible? Why?, at: <https://www.farmers.gov/cfap> (July 31, 2020).

<sup>366</sup> For example, the USDA website lists eggs and layers as being ineligible for CFAP. See USDA, Coronavirus Food Assistance Program, at: <https://www.farmers.gov/cfap> (July 31, 2020).

<sup>367</sup> For a copy of the application, see USDA, Coronavirus Food Assistance Program, CFAP Application, at: <https://www.farmers.gov/cfap>. For additional information on applying for the CFAP direct payments program, visit: <https://www.farmers.gov/cfap>.

<sup>368</sup> The USDA website provides what it is calling a CFAP Application Generator and Payment Calculator. This is an Excel workbook that allows farmers to input the required information about the farm's production, and that information is then automatically transferred into the CFAP application, form AD-3114, which the farmer can then print and sign. See <https://www.farmers.gov/cfap>.

<sup>369</sup> USDA Farmers to Families Food Box, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

<sup>370</sup> Details on the RFPs can be found on the Agricultural Marketing Service (AMS) website, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

<sup>371</sup> USDA Farmers to Families Food Box, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

<sup>372</sup> USDA Farmers to Families Food Box, at: <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

2020.<sup>373</sup> The RFP for this third round introduces changes that may impact some farmer's ability to participate in the Food Box Program.<sup>374</sup>

According to USDA, as of July 29, 2020, the Food Box Program has distributed over 50 million food boxes.<sup>375</sup>

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<sup>373</sup> Press Release, USDA Announces Third Round of Farmers to Families Food Box Program Purchases, Release Number 0330.20 (July 29, 2020), at: <https://www.usda.gov/media/press-releases/2020/07/24/usda-announces-third-round-farmers-families-food-box-program>.

<sup>374</sup> To view the third RFP, visit: USDA Farmers to Families Food Box, see: [https://www.ams.usda.gov/sites/default/files/media/FFFB\\_solicitationRound3.pdf](https://www.ams.usda.gov/sites/default/files/media/FFFB_solicitationRound3.pdf).

<sup>375</sup> Press Release, Farmers to Families Food Box Program Reaches 50 Million Food Boxes Delivered, Release Number 0333.20 (July 29, 2020), at: <https://www.usda.gov/media/press-releases/2020/07/29/farmers-families-food-box-program-reaches-50-million-boxes>.

## Chapter Seven: The CARES Act Bankruptcy Provisions

The CARES Act changed some of the statutes that govern bankruptcy.<sup>376</sup> 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 did not make changes to Chapter 12. It did, 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.<sup>377</sup> 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.<sup>378</sup> These changes allow people in Chapter 7 and Chapter 13 to exclude COVID-19 payments from income for bankruptcy eligibility purposes.<sup>379</sup> In addition, the CARES Act makes COVID-19 payments not a part of disposable income for a Chapter 13 plan.<sup>380</sup> The CARES Act also allows people in Chapter 13 to amend a confirmed plan and extend the period for the plan.<sup>381</sup>

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<sup>376</sup> 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).

<sup>377</sup> CARES Act § 1113(a)(1) (2020).

<sup>378</sup> CARES Act § 1113(a)(1) (2020).

<sup>379</sup> CARES Act § 1113(b)(1)(A) (2020).

<sup>380</sup> CARES Act § 1113(b)(1)(B) (2020).

<sup>381</sup> 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.<sup>382</sup> 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.<sup>383</sup> 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

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<sup>382</sup> 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>.

<sup>383</sup> 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.<sup>384</sup> 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,<sup>385</sup> closed-end installment loans,<sup>386</sup> single payment loans for those affected by COVID-19, as well as consideration of workout strategies with borrowers.<sup>387</sup>

Historically, small-dollar loans have been a common source of abuse of consumers and small businesses.<sup>388</sup> Farmers should therefore be especially careful to read the terms of such loans.

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<sup>384</sup> 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>.

<sup>385</sup> 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.

<sup>386</sup> 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.

<sup>387</sup> 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 (9<sup>th</sup> ed. 2009). A workout generally is negotiated by the debtor and creditor and done outside of court.

<sup>388</sup> 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.<sup>389</sup> 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.<sup>390</sup> 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.<sup>391</sup> 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.

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<sup>389</sup> 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.

<sup>390</sup> 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>.

<sup>391</sup> 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 began reporting on administrative actions in response to COVID-19 in a news release on March 26, 2020.<sup>392</sup> The changes announced in the news release affect FSA availability, and suggest some flexibility in servicing direct and guaranteed loans. These and other policy changes made by USDA are now mainly found on the USDA website.<sup>393</sup> USDA may 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 can be difficult to know exactly how the changes discussed below will work.

### A. FSA Availability

For a time, Farm Service Agency (FSA) county offices were open by phone appointment only.<sup>394</sup> During that time, FSA should have been available to help farmers with program sign-up, loan servicing, and other important matters. Employees were still going to the office but trying to work with farmers by phone, email, and through on-line materials “whenever possible.”

USDA now says it is possible to make in person appointments with some local offices.<sup>395</sup> The opening of offices will take place on a county-by-county basis.

Some online availability for documents has been expanded.<sup>396</sup> Field work, according to USDA, continues with social distancing.

### 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.<sup>397</sup> 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.<sup>398</sup>

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<sup>392</sup> 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>.

<sup>393</sup> According to USDA, the most current updates on available services in response to COVID-19 can be found at: USDA, Coronavirus and USDA Assistance for Farmers (July 30, 2020), at: <https://www.farmers.gov/coronavirus>.

<sup>394</sup> USDA News Release (March 26, 2020).

<sup>395</sup> USDA, Coronavirus and USDA Assistance for Farmers, Updated Service Center Status and Continued Service (July 30, 2020), at: <https://www.farmers.gov/coronavirus>.

<sup>396</sup> USDA, Coronavirus and USDA Assistance for Farmers, Updated Service Center Status and Continued Service (July 30, 2020), at: <https://www.farmers.gov/coronavirus>.

<sup>397</sup> 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>.

<sup>398</sup> 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](https://www.fsa.usda.gov/Internet/FSA_Notice/ao_1751.pdf)



## C. Loan Program Processing

FSA says some changes have been made to the loan-making process.<sup>399</sup>

### 1. Application Deadlines Extended

The deadline for farmers to complete a farm loan application can be extended.<sup>400</sup> This includes additional notice to borrowers who submit incomplete applications.

### 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.<sup>401</sup> 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.<sup>402</sup>

### 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.<sup>403</sup> 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.<sup>404</sup>

### 5. Remote Paperwork

FSA is allowing faxed or scanned signatures as well as virtual notary service, and is using video conferencing for loan closings.<sup>405</sup>

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<sup>399</sup> USDA News Release (March 26, 2020).

<sup>400</sup> USDA News Release (March 26, 2020); FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 30, 2020), at: <https://www.farmers.gov/coronavirus>.

<sup>401</sup> FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 30, 2020), at: <https://www.farmers.gov/coronavirus>.

<sup>402</sup> FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 30, 2020), at: <https://www.farmers.gov/coronavirus>.

<sup>403</sup> USDA News Release (March 26, 2020); FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 30, 2020), at: <https://www.farmers.gov/coronavirus>.

<sup>404</sup> USDA News Release (March 26, 2020); FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, at <https://www.farmers.gov/coronavirus>, at: <https://www.farmers.gov/coronavirus>.

<sup>405</sup> FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 30, 2020).

## **D. Direct Loan Servicing**

The following changes have been made regarding the servicing of existing direct loans.<sup>406</sup>

### **1. Disaster Set-Aside**

FSA has made what is known as the Disaster Set-Aside program available during the COVID-19 crisis.<sup>407</sup> That means that an annual installment can be set aside and added to the final installment. For annual operating loans, the maturity of the loan may be extended for up to twelve months in order to set aside the installment.

### **2. 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.<sup>408</sup> These deadline extensions also apply to submitting a complete application for loan servicing, accepting an offer for loan servicing, providing a response to an offer of loan servicing, or requesting homestead protection.<sup>409</sup>

### **3. Accelerations and Some Foreclosures are Suspended**

FSA will temporarily stop taking several actions on direct loans.<sup>410</sup> The actions to be suspended include loan accelerations, non-judicial foreclosures, and referring foreclosures to the Justice Department.<sup>411</sup> 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.

### **4. Extending Repayment Periods**

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<sup>406</sup> USDA News Release (March 26, 2020).

<sup>407</sup> FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 30, 2020); USDA, Press Release, FSA Expands Set-Aside Loan Provision for Customers Impacted by COVID-19 (May 21, 2020), at <https://www.fsa.usda.gov/news-room/news-releases/2020/fsa-expands-set-aside-loan-provision-for-customers-impacted-by-covid-19>.

<sup>408</sup> USDA News Release (March 26, 2020); FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 30, 2020).

<sup>409</sup> FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 30, 2020).

<sup>410</sup> FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities, (July 30, 2020).

<sup>411</sup> 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 are 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 16-31 to 16-35, paras. 567-568 (July 27, 2020).

FSA has decided to extend repayment periods for annual operating loans beyond eighteen months to help borrowers through the Covid-19 crisis.<sup>412</sup>

### **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.<sup>413</sup> 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.<sup>414</sup> 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.<sup>415</sup> 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. Animal Mortality Disposal**

As a part of USDA's Environmental Quality Incentives Program (EQIP), farmers may receive financial and technical assistance for disposal of animal carcasses.<sup>416</sup> This includes seven common methods for disposing of the carcasses. Farmers need to file an application and an approved early start waiver with NRCS before disposing of the carcasses. The farmer must have certain records. Before payment, mortality certification is required by a veterinarian or an animal health specialist. There are standard pay rates, with historically underserved producers receiving an increased payment rate. A detailed set of USDA Natural Resource and Conservation Service rules apply.<sup>417</sup>

### **G. USDA Appeals**

The USDA appeals system continues to be in place.<sup>418</sup>

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<sup>412</sup> FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 9, 2020), at: <https://www.farmers.gov/coronavirus>.

<sup>413</sup> USDA News Release (March 26, 2020).

<sup>414</sup> USDA News Release (March 26, 2020).

<sup>415</sup> FSA, Coronavirus and USDA Assistance for Farmers, Farm Loan Flexibilities (July 30, 2020).

<sup>416</sup> FSA, Coronavirus and USDA Assistance for Farmers, Animal Morbidity (July 30, 2020), at: <https://www.farmers.gov/coronavirus>; USDA, NRCS, Emergency Animal Mortality Management (May 2020), at <https://www.farmers.gov/sites/default/files/documents/EQIP%20-%20Emergency%20Animal%20Mortality%20Management%20Factsheet%20-%20All%20Livestock.pdf>.

<sup>417</sup> NRCS, Practice Code 368, Emergency Animal Mortality Management (May 2016), at: [https://efotg.sc.egov.usda.gov/references/public/AL/368\\_cps\\_EmergencyAnimalMortalityMngmnt.pdf](https://efotg.sc.egov.usda.gov/references/public/AL/368_cps_EmergencyAnimalMortalityMngmnt.pdf).

<sup>418</sup> 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.<sup>419</sup> 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.

### D. 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.<sup>420</sup> 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.<sup>421</sup>

The existence of COVID-19, itself, will not create an insurable loss.<sup>422</sup> In addition, failure to plant because of an uninsured cause is not considered prevented planting for crop insurance.<sup>423</sup> So if a farmer is unable to plant because COVID-19 caused a lack of proper equipment or labor, or the ability to use a certain production method, that not considered prevented planting. 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.<sup>424</sup> Even then, however, the policy can be complicated.<sup>425</sup>

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<sup>419</sup> For a general summary of how crop insurance works, see Congressional Research Service, Federal Crop Insurance: Program Overview for the 115<sup>th</sup> Congress (May 10, 2018), at: <https://crsreports.congress.gov/product/pdf/R/R45193/4>. For a summary of the changes made by RMA see RMA, COVID 19 Response (May 29, 2020), at: <https://www.rma.usda.gov/News-Room/Frequently-Asked-Questions/COVID-19-Response>.

<sup>420</sup> 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.

<sup>421</sup> 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).

<sup>422</sup> See RMA, COVID-19 Response (May 29, 2020).

<sup>423</sup> See RMA, COVID-19 Response (May 29, 2020).

<sup>424</sup> 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>.

<sup>425</sup> 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

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 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.

### **E. 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 “Manager’s Bulletins,” which provide guidance for insurance providers that sell the insurance (known as Approved Insurance Providers, or AIPs), RMA field offices, and others.<sup>426</sup> RMA’s website also includes a list of frequently asked questions that address many of the issues covered in RMA’s Manager’s Bulletins, as well as other issues, such as changes to self-certification, whether COVID-19 is an insurable cause of loss (it is not), replanting payments, and assignment of indemnities.<sup>427</sup> RMA says it will update this list on an ongoing basis. Finally, USDA’s website provides a summary of the various crop insurance flexibilities that have been established in response to COVID-19, and it includes many press releases that announce changes.<sup>428</sup>

The following is a very brief description of some of the crop insurance changes made in response to COVID-19. Some of the changes affected actions, decisions, and deadlines that are now in the past.

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loss is not covered. See Whole-Farm Handbook §§ 91-92 (crop year 2020); Whole-Farm Policy § 21 (crop year 2020).

<sup>426</sup> A list of RMA’s Manager’s Bulletins can be found on RMA’s website, at: <https://rma.usda.gov/Policy-and-Procedure/Bulletins-and-Memos/Managers-Bulletins>.

<sup>427</sup> See RMA, COVID-19 Response (May 29, 2020), at: <https://www.rma.usda.gov/News-Room/Frequently-Asked-Questions/COVID-19-Response>.

<sup>428</sup> USDA, Updates on USDA Program Flexibilities, Crop Insurance Flexibilities (July 30, 2020), at: <https://www.farmers.gov/coronavirus>; USDA, Press Releases (July 30, 2020), at: <https://www.usda.gov/media/press-releases>.

## 1. Remote Communication

Crop insurance providers are encouraged to use remote communications with farmers.<sup>429</sup> This can include e-signatures, the telephone, and web portals. Acreage and production reports and policy election decisions are examples of things that can be communicated remotely. For the 2021 crop year, some crop year sales and reporting dates may be done remotely.

## 2. Extended Deadlines

Deadlines are extremely important when using crop insurance. USDA has extended some of these deadlines. This includes deadlines for some acreage reports and production reports.<sup>430</sup> There are extensions for some sales reporting deadlines, and deadlines for some options and endorsements.<sup>431</sup> There are also delays allowed for making premium and other payments and requesting written agreements.<sup>432</sup> Interest can be deferred.

## 3. Dairy Issues

Dairy Revenue Protection sales periods have been revised.<sup>433</sup> In addition, dumped milk may be counted as a milk marketing for the purposes of Dairy Revenue Protection and an actual marketing for Livestock Gross Margin for Dairy.<sup>434</sup>

## 4. Replant Inspections

Some replant inspections can be self-certified.<sup>435</sup>

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<sup>429</sup> USDA, Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response (May 29, 2020). For details, see RMA, Managers Bulletin: MGR-20-005, COVID-19 and Crop Insurance Deadlines (March 27, 2020).

<sup>430</sup> Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response (May 29, 2020). For details, see RMA, Managers Bulletin: MGR-20-020, COVID-19 FSA Acreage Reporting Date (July 9, 2020); RMA, Managers Bulletin: MGR-20-015, COVID-19 FSA Acreage Reporting Date (May 28, 2020); RMA, Managers Bulletin: MGR-20-006.1, COVID-19 Impact on Production Reporting Date for Crops (April 10, 2020); RMA, Managers Bulletin: MGR-20-005, COVID-19 and Crop Insurance Deadlines (March 27, 2020); RMA, Managers Bulletin: MGR-20-006, COVID-19 Impact on Production Reporting Date for Crops Insured Under the Common Crop Insurance Policy (March 27, 2020).

<sup>431</sup> RMA, Managers Bulletin: MGR-20-009, COVID-19 and Crop Insurance Deadlines—Additional Relief (April 10, 2020).

<sup>432</sup> USDA, Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response (May 29, 2020); USDA News Release (March 27, 2020). For details, see RMA, Managers Bulletin: MGR-20-007, COVID-19 Relief—Deferral of Interest Charges on Crop Insurance Premiums (March 27, 2020); RMA, Managers Bulletin: MGR-20-015, COVID-19 FSA Acreage Reporting Date (May 28, 2020); RMA, Managers Bulletin: MGR-20-016, COVID-19 Additional Deferral of Interest Charges (May 28, 2020).

<sup>433</sup> USDA, Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response (May 29, 2020). For details, see RMA, Managers Bulletin: MGR-20-017, Dairy Revenue Protection Sales Period (May 29, 2020).

<sup>434</sup> USDA, Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response (May 29, 2020). For details, see RMA, Managers Bulletin: MGR-20-010, Dumped Milk on Dairy Revenue Protection and Livestock Gross Margin (April 10, 2020).

<sup>435</sup> USDA, Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response.



## 5. Assignments

The witness signature requirements for assignments has been waived.<sup>436</sup>

## 6. Nursery Inspections

Nursery inspections for the 2021 crop year have been waived for the Nursery and Nursery Value Select programs in some cases.<sup>437</sup>

## 7. Perennial Crop Inspections

In some cases, an inspection of perennial crops will not be needed as would normally be the case, and some deadlines are delayed.<sup>438</sup>

## 8. Organic

Insurance providers can allow organic producers to report acres as certified organic or in transition before they have the final certification if the producers can show they have requested certification by the acreage closing date.<sup>439</sup> This applies for those who have Whole Farm Revenue Protection policies as well as other policies.

### F. 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.<sup>440</sup> Similar to crop insurance, coverage under NAP requires the payment of fees and premiums, as well as compliance with complicated program rules.<sup>441</sup>

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.<sup>442</sup> Any farmer who purchased NAP coverage should be extremely careful before making changes to their farming operation and should first contact FSA.

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<sup>436</sup> USDA, Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response (May 29, 2020).

<sup>437</sup> USDA, Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response (May 29, 2020).

<sup>438</sup> USDA, Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response (May 29, 2020).

<sup>439</sup> USDA, Coronavirus and USDA Assistance for Farmers, Crop Insurance Flexibilities (July 30, 2020); RMA, COVID-19 Response (May 29, 2020). For details, see RMA, Managers Bulletin: MGR-20-013, COVID-19 Relief for Organic Plans (May 4, 2020).

<sup>440</sup> See, generally, 7 U.S.C. § 7333.

<sup>441</sup> 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>.

<sup>442</sup> 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.<sup>443</sup> 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.<sup>444</sup> 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.”<sup>445</sup>

Some states are also placing limits on debt collection activities and repossessions from private creditors.<sup>446</sup> The exact nature of these limits varies, from prohibiting self-help repossessions<sup>447</sup> 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.<sup>448</sup>

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

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<sup>443</sup> 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/>.

<sup>444</sup> 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>.

<sup>445</sup> 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>.

<sup>446</sup> 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).”

<sup>447</sup> Self-help repossessions occur when a party claiming a right to ownership takes property back without going through the court system.

<sup>448</sup> 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 website with links to all state court changes made in response to COVID-19.<sup>449</sup> 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.<sup>450</sup>

Federal courts have also begun to make changes in how they conduct themselves.<sup>451</sup>

Tribal courts have begun to take action as well.<sup>452</sup>

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<sup>449</sup> See, National Center for State Courts, Coronavirus and the Courts (July 30, 2020), at: <https://www.ncsc.org/newsroom/public-health-emergency>. The Brennan Center is collecting information on court changes generally. See Courts' Responses to the Covid-19 Crisis (July 1, 2020), at: <https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis>.

<sup>450</sup> National Consumer Law Center, Major Consumer Protections Announced in Response to COVID-19 (June 17, 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 (May 28, 2020), at: <https://finesandfeesjusticecenter.org/articles/ffjc-policy-recommendations-for-the-covid-19-crisis/>.

<sup>451</sup> Many appellate courts have restricted 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 (July 30, 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>.

<sup>452</sup> For information, see National American Indian Court Judges Association, Pandemic Resources for Tribal Courts (July 30, 2020), at: <https://naicja.wildapricot.org/>; and The Tribal Law and Policy Institute, Court and Legal Resources (July 30, 2020) at <https://www.home.tlpi.org/courts-courtstaff>.

## 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.<sup>453</sup>

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.<sup>454</sup> The Small Business Administration (SBA) is warning people about scams related to SBA COVID-19 relief.<sup>455</sup> 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.<sup>456</sup>

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<sup>453</sup> For information on these types of scams, see Consumer Financial Protection Bureau, What Are Mortgage Loan Modification Scams? (May 6, 2020), at: <https://www.consumerfinance.gov/ask-cfpb/what-are-mortgage-loan-modification-scams-en-272/>.

<sup>454</sup> Information on COVID-19 related scams can be found on the website for the National Association of Attorneys General (July 30, 2020), at: <https://www.consumerresources.org/beware-coronavirus-scams-and-price-gouging/>.

<sup>455</sup> Small Business Administration, SBA Programs—Scams and Fraud Alerts (July 14, 2020), at: <https://www.sba.gov/document/report--sba-programs-scams-fraud-alerts>

<sup>456</sup> Federal Trade Commission, Avoid Coronavirus Scams (July 30, 2020), at: <https://www.consumer.ftc.gov/features/coronavirus-scams-what-ftc-doing>; Federal Communications Commission (FCC), COVID-19 Consumer Warnings and Safety Tips (July 30, 2020), at: <https://www.fcc.gov/covid-scams>; Treasury Department, Covid-19 Scams (July 30, 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.<sup>457</sup> 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.<sup>458</sup>

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<sup>457</sup> 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>.

<sup>458</sup> 7 C.F.R. § 15d.3(a) (2020).