1991

Federal Farm Program Payment-Limitations Law:
A Lawyer's Guide

Christopher R. Kelley

Alan R. Malasky

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FEDERAL FARM PROGRAM PAYMENT-LIMITATIONS LAW: A LAWYER'S GUIDE

Christopher R. Kelley†
Alan R. Malasky††

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† Attorney, National Center for Agricultural Law Research and Information (NCALRI) and Assistant Research Professor of Law, University of Arkansas School of Law, Fayetteville, Arkansas. B.A. 1969, Louisiana State University; J.D. 1975, Howard University; LL.M. 1986, University of Arkansas.

The material in this article is based upon work supported by the United States Department of Agriculture (USDA), National Agricultural Library under Agreement No. 59-32U4-8-13. Any opinions, findings, conclusions, or recommendations in this publication are those of the authors and do not necessarily reflect the views of the USDA or the NCALRI.

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Introduction

Since the 1930s, the federal government has supported farm income and commodity prices through various means, including direct payments to producers.1 Although the expenditure

1. Federal farm programs are commonly divided into three broad categories: income support, price support, and resource adjustment. Income support programs do what their name suggests; they are designed to support the income of agricultural producers. Their broad function is to raise farm incomes while simultaneously insuring consumers an inexpensive and readily available food supply. See J. Looney, J. Wilder, S. Brownbeck & J. Wadley, AGRICULTURAL LAW: A LAWYER'S GUIDE TO REPRESENTING FARM CLIENTS ch. 6 (1990) [hereinafter REPRESENTING FARM CLIENTS]; W. Cochrane & M. Ryan, AMERICAN FARM POLICY, 1948-1973, at 17-20 (1976) [herein-
of federal funds to support farm income has presented and

Participation in federal farm programs is voluntary. Producers usually decide to participate in an income support program for financial reasons. If, for a given crop year, a producer believes commodity prices will be high enough so that more income can be realized by operating outside the program and its attendant constraints, such as taking land out of production and complying with conservation practices, the producer will usually choose not to participate. On the other hand, if the producer believes commodity prices will be low or if the producer wishes to avoid being completely exposed to market risks, participation in a program offers a level of income security. See Congressional Budget Office, Farm Program Flexibility: An Analysis of the Triple Base Option 10-11 (Dec. 1989).

Price support programs are intended to stabilize farm prices by maintaining farm prices when supply exceeds demand or when reduced demand lowers prices. Price support is primarily accomplished through two means, nonrecourse loans and government purchases. See J. Ward, Farm Commodity and Related Programs 24-26 (Agricultural Stabilization and Conservation Serv., U.S. Dep't of Agric. Handbook No. 345, 1976).

Prior to 1973, support for producers' incomes was accomplished through what is known today as price support. Price support farm programs then sought to provide producers with income at some degree of "parity" level, "parity" being an inexact and controversial construct that compares the income of farm families with those of nonfarm families. Parity is achieved when farm families attain the same standard of living as nonfarm families. The base period for that comparison is 1910 through 1914. See L. Teigen, Agricultural Parity: Historical Review and Alternative Calculations (Economic Research Serv., U.S. Dep't of Agric., Econ. Rep. No. 571, 1987).

Today, the concept of "parity" is a less pervasive standard for supporting farmers' income. Moreover, current farm programs can be distinguished by primary function into separate categories of price support and income support.


Production adjustment programs are also known as "supply management" programs. These programs attempt to influence the supply of farm products in the marketplace, thereby preventing large surpluses which may depress prices while simultaneously maintaining adequate reserves. Production adjustment programs largely operate by limiting production or removing excess supplies from the market. In that way, they also serve to reduce the cost of price and income support programs.

Production adjustment programs include acreage allotments, marketing quotas, cropland set-asides, acreage reductions and diversions, farmer-held grain reserves, and long-term conservation programs such as the Conservation Reserve Program.
PAYMENT-LIMITATIONS LAW

continues to present a variety of economic and social policy questions, two persistent issues are how much should the federal government spend to support farm income and who should receive that income support.

To an extent, the resolution of these issues rests in the body of federal farm program law collectively referred to as "payment limitations." Federal farm program payment-limitations law serves two broad functions. First, it limits the amount of federal farm program payments a producer can receive in a crop year or other comparable period. In doing so, it addresses the issue of how much the federal government should spend to support farm income. Second, federal farm program payment-limitations law limits eligibility for farm program payments to "persons" who are "actively engaged in farming." In doing so, payment-limitations law addresses the issue of who should receive the income support provided by federal farm programs.

Consistent with the nature of the broad economic and social policy issues underlying its existence, federal farm program payment-limitations law is controversial.2 The limits on the amount of program payments a producer can receive in a crop year or other comparable period are controversial because they must accommodate both the government's need to limit expenditures and the producer's need to receive income support.3 In other words, the limits must "reduce costs and pre-


2. The controversial nature of payment limitations often causes producers to be defensive about their concerns over how the limits affect their operations. For example, consider the following:

"I don't want to be quoted," is the response you hear from farmers questioned about their efforts to escape the $50,000 limit on government price-support payments. Most refuse to talk at all. "It's like carrying gasoline past a fire," says one farmer. Adds a farm manager, "Let someone else stick their head out. No one wants to be a public figure on this one."

Russnogle, $50,000 Limit Backs Off the Big Boys, FARM J., May 1987, at 24 [hereinafter Russnogle].

The controversial nature of payment limitations also appears to inspire the government to take action against alleged "abuses" of the payment-limitations rules prior to congressional action on farm program legislation. See Wojahn, "I've Done Nothing Wrong: Accused Program Abuser Vows to Keep Fighting and Farming, FARM FUTURES, July-Aug. 1990, at 22; Cash Crop: Many Farmers Harvest Government Subsidies in Violation of Law, Wall St. J., May 8, 1990, at 1, col. 6 (S.W. ed.).

vent farmers from benefiting excessively. Invariably, the limits do not satisfy everyone, and questions exist concerning the ability of the government to administer a payment-limitations scheme efficiently and effectively.

The program eligibility requirements embodied in payment-limitations law are controversial because they determine the beneficiaries of the federal farm programs. Those who advo-


sented a continuing response to burgeoning federal farm program costs. See History of Agricultural Price-Support, supra note 1, at 27 (noting the limits established in the Agricultural Act of 1970 were established "in response to growing worries about high government expenditures for agricultural programs, which had reached a new peak of $3.8 billion in 1969").


5. Even producers do not agree on what the payment limit amounts should be. A 1989 survey of producers in twenty-one states designed to determine attitudes to-

ward the need for changes in the payment limits established under the Food Security Act of 1985, Pub. L. No. 99-198, § 1001, 99 Stat. 1354, 1444-46 (codified at 7 U.S.C. § 1308 (1988)), found thirty-nine percent of the respondents preferred to make no change; twenty-seven percent desired to decrease the limit; eleven percent wanted to eliminate it; and seven percent wanted to increase it. Formulation of the 1990 Farm Bill (Wheat, Soybeans, and Feed Grains Programs): Hearings Before the Comm. on Agriculture, 101st Cong., 2d Sess. 576 (1990) (statement of Andrew P. Barkley, Ass't Professor, Kansas State University, incorporating H. Guither, B. Jones, M. Martin & R. Spitz, U.S. Farmers' Preferences for Agricultural and Food Policy in the 1990s (1989)). For an excellent account of the debate in Congress over payment limitations during the consideration of the 1990 Farm Bill, see Cloud, "Farm Bloc on the Defensive as Bills Move to Floor," 48 CONG. Q. WEEKLY REP. 2209 (July 14, 1990).

6. See Nuckton, Farm Program Conflicts: The $50,000 Case, CHOICES, 4th Qtr., 1989, at 34-35 [hereinafter Nuckton] (urging the abolition of payment limits on the grounds that they are neither effective nor efficient); see also U.S. GEN. ACCOUNTING OFFICE, 1990 FARM BILL: OPPORTUNITIES FOR CHANGE 15-16 (Pub. No. RCED-90-142, Apr. 1990) (noting that "[c]lapping farm program payments at $50,000 has proven to be an elusive goal").
cate "targeting" program payments to those having the greatest need for income support are dissatisfied with the current eligibility requirements which do not direct income support in accordance with need.\(^7\)


A study of the distribution of federal farm program payments during 1987 drew the following conclusions:

1. Thirty-three percent of all farms received payments, but 72% of cash grain farms and 87% of cotton farms received payments.
2. Cotton and cash grain producers received average payments of $29,380 and $16,986, respectively. All other farm types had average payments that were less than the national average of $13,800.
3. Farms with net cash returns of $50,000 or more accounted for about 20% of all farms receiving payments, 51% of sales, and about 60% of all direct payments received.
4. Farms with $1 million or more in sales received payments that averaged $79,660. These farms accounted for about one-half of 1% of the farms receiving payments and 3.2% of the total payments.
5. The smallest average payments went to individuals, but they received 73% of all payments. Corporations other than family corporations received the largest payments, but they accounted for less than one-tenth of 1% of the farms receiving payments and about one-half of 1% of the payments.


Various proposals for "targeting" federal farm program payments are discussed in U.S. Gen. Accounting Office, Farm Programs: Analysis of Options for Targeting Payments and Crop Loans (Pub. No. RCED-87-144, Sept. 1987). Among the farm organizations urging the "targeting" of payments is the National
Payment-limitations law is also complicated. Indeed, it has been described by officials charged with its implementation as "too complicated to fully understand."\(^8\)

Despite its complexity, the law of payment limitations is vitally important to participants in federal farm programs for at least two reasons. First and foremost, because payment-limitations law limits the receipt of most annual farm program payments to "persons" who are "actively engaged in farming," every program participant must conform to the "actively engaged in farming" requirement to receive program payments.\(^9\)

Thus, even a producer whose payments will not approach any of the allowable limits is directly affected by payment-limitations law.

Second, many producers are directly affected by one or

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Farmers Union which "would prefer a targeting plan that concentrates on supporting the family farm system of agriculture over a plan that calls for supporting a percentage of all farmers' production." *Formulation of the 1990 Farm Bill: Hearings Before the House Comm. on Agriculture*, 101st Cong., 2d Sess. 299, 302 (1989) (statement of Leeland Swenson, President, Nat'l Farmers Union).

8. That characterization is found in the following findings of the United States General Accounting Office (GAO) on the administration of the current payment limitation rules:

According to ASCS [Agricultural Stabilization and Conservation Service] officials [who administer the payment limitation rules], the paperwork that producers must complete is so complex that producers often seek the assistance of the county office staff to complete the forms, imposing an additional work load demand on ASCS. They described [payment-limitations] provision as too complicated to fully understand and said that all of the instructions and revisions were a "nightmare" to keep track of. Another official said that the payment limitation provision required a tremendous amount of time to administer because the definitions and guidelines for determining persons had become increasingly complex to combat abuse of the system.


The complexity of the payment-limitations rules takes its toll on producers:

A hidden cost in the [payment-limitations] program is the emotional toll it takes on farmers. "It's a monster. Some can cope with the mental strain and some can't," says a Southern farmer and county ASCS committee chairman. "These are good people who are trying to stay within the rules. But they worry about whether it will be accepted or if it's against the law. There's no way of measuring what that does to a person."

Russnogle, supra note 2, at 26.

9. Becoming or remaining eligible for farm program payments can be critical to a producer's financial survival. During periods of low commodity prices when participation in federal farm programs tends to be high, producers depend heavily on farm program payments for their farm income. For example, in 1987 when participation in federal farm programs was at very high levels, federal farm program payments to Indiana producers constituted 74% of their net farm income. Wall St. J., May 24, 1990, at 1, col. 5 (S.W. ed.).
more of the payment limits. These producers have farming operations productive or large enough to receive more program payments than the limits allow. Because the payment limits apply to "persons," not farming operations, a producer who operates a farm capable of earning more farm program payments than are permitted to be paid to a single producer may lose potential income.

To illustrate how a producer may be directly affected by a payment limit, consider a producer farming 2,500 acres of rice in California. In 1986, if that producer had a yield equal to the state's average yield for rice, the producer would receive $329 per acre in federal farm program payments known as deficiency payments.\(^\text{10}\) However, to participate in the rice program in 1986, the producer would have had to "set aside," or not plant rice on, thirty-five percent of the acreage.\(^\text{11}\) Therefore, the deficiency payments would be payable on only 1,625 acres, and, were there not a payment limit, the producer would receive $534,625. However, in 1986, there was a $50,000 limit on deficiency payments for rice. In this hypothetical, that limit was reached with only 152 acres.\(^\text{12}\)

The situation faced by the hypothetical rice producer also illustrates the second reason why a producer may have a vital interest in understanding payment-limitations law. Since 152 acres of rice in California is not an economic unit,\(^\text{13}\) the only way in which the producer in the foregoing hypothetical can realize more in deficiency payments is to reorganize the farming operation so there are more "separate persons" participating in it.

The phrase "separate persons" is a payment-limitations term of art. To be a "separate person" for payment-limitations purposes, a number of requirements, including the "actively engaged in farming" requirement, must be satisfied. Once deemed to be a "separate person," an individual or entity is entitled to receive program payments up to the amount of the applicable payment limit without regard to the amount of payments received by others participating in the farming op-

\(^\text{10}\) For an explanation of deficiency payments, see infra note 35.
\(^\text{11}\) For a discussion of "set aside" requirements in farm programs, see infra note 36.
\(^\text{12}\) Nuckton, supra note 6, at 34.
\(^\text{13}\) Id.
eration. Thus, increasing the number of "separate persons" increases the number of payment limits available to that farming operation.

Because increasing the number of "separate persons" in a farming operation increases the number of payment limits available to the operation, producers facing circumstances such as those facing the hypothetical rice producer need to understand the workings of payment-limitations law to make their operations economical. When commodity prices are low and producers must resort to the "income 'safety net'" provided by federal farm programs, an understanding of payment-limitations law may be critical to the financial survival of many producers.

This article is intended as a guide to the basics of federal farm program payment-limitations law. It addresses neither the wisdom of limiting federal farm program payments nor the merits of the programs subject to payment limitations.

14. H.R. REP. No. 100-391(I), 100th Cong., 1st Sess. 46, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 2313-1, 2313-46 (noting a basic function of federal farm programs was to provide "an income 'safety net' for persons who depend on a profitable pursuit of agricultural product for their livelihood").


[Editor's Note: Prior to publication of this article, new proposed rules were issued contemplating renumbering of the 7 C.F.R. § 1497 series. See 56 Fed. Reg. 8287 (1991). An editorial decision was made to retain the current numbers.]

16. The policy debate over payment limitations often merges into a debate over the merits of federal farm programs. Those who oppose payment limitations usually argue that the limits are too high and payments are not targeted to small or family-
Rather, this article explains how the payment-limitations rules work and critically analyzes the ways in which the statutes and regulations governing payment limitations are interpreted by those who are responsible for administering them.

This article's explanation of payment-limitations rules is divided into eight parts. Part I provides a brief introduction to the agency responsible for the administration of the rules, the Agricultural Stabilization and Conservation Service ["ASCS"], and to that agency's internal interpretative and instructional manual on payment limitations, the ASCS Handbook for State and County Operations: Payment Limitations. From there, this article focuses on the major features of payment-limitations law and progressively develops each of those features to provide an overview of the law's basic workings.

Payment-limitations law has three major features. Specifically, it:

1. caps the dollar amount of certain federal farm program payments a producer may receive in a crop year or other comparable period;
2. restricts eligibility for certain federal farm program payments to producers who are "persons actively engaged in farming"; and
3. limits a producer's ability to create entities that separately qualify for farm program payments.

Of these three major features of payment-limitations law, the capping of the dollar amount of program payments a producer may receive in a crop year or other comparable period has his-sized farms. The following critique, although both simplistic and superficial, is typical of such arguments:

The history of the payment limitation can thus be succinctly stated: The limitation is usually set so high that it affects almost no one, and if it threatens to discourage participation in acreage-reduction programs by driving larger farms out of the programs, it is raised or suspended. In short, Congress doesn't really mean to target the benefits of commodity programs to family-sized farms. It only wants to leave the impression that it does. Payment limitations are now a political ritual in every farm bill—obligatory and meaningless. Living the myth that bigger is better sometimes requires living a lie.


torically been the most fundamental. Through the years, all payment-limitations legislation has capped program payments. Accordingly, this article’s explanation of the payment-limitations rules begins with this feature, found in Part II.

Since its initial imposition in the 1989 crop year, the second major feature of payment-limitations law, the restriction of eligibility for program payments to producers who are “persons” deemed to be “actively engaged in farming,” has achieved special prominence for at least two reasons. First, all producers who currently seek program payments must satisfy the eligibility requirements. Second, the restriction of eligibility for program payments is the most complex aspect of payment-limitations law. 17 For these two reasons, Parts III through V of this article are devoted to the “actively engaged in farming” requirement and its application to the individuals and entities eligible to be “persons” under payment-limitations law.

The third feature of payment-limitations law, the limitation on a producer’s ability to create entities that separately qualify for program payments, serves to reinforce the law’s other two features. It is explained in Part VI.

The remaining parts are devoted to ancillary matters. Part VII discusses changes in farming operations. Part VIII discusses the prohibition against schemes or devices intended to circumvent the payment-limitations rules and the administrative appeals process for payment-limitations disputes.

I. THE ASCS AND THE ASCS HANDBOOK

The ASCS administers the payment-limitations laws and regulations18 discussed in this article. The ASCS operates

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17. Shortly before the “actively engaged in farming” requirement was imposed, a lobbyist for the National Association of Corn Growers predicted the requirement “could be a nightmare for everybody in agriculture.” See Taylor, USDA Wants To Plug Payment Loopholes, FARM J., Apr. 1987, at 17. Two years later, a GAO report lent support to the accuracy of that prediction. See supra note 8.

18. 7 C.F.R. § 1497.2(a) (1990). The annual commodity programs that are subject to the payment limitations discussed in this article are funded under authority granted by Congress to the Commodity Credit Corporation (“CCC”). 15 U.S.C. §§ 714-714p (1988). However, the officials and personnel of the ASCS carry out the actual administration of those programs. Both the CCC and the ASCS are subject to the general supervision of the Secretary of Agriculture. 7 U.S.C. § 2204 (1988). For more detailed discussions of the respective roles of the ASCS, the CCC, and the Secretary of Agriculture in the implementation of federal farm programs, see C. KELLEY & J. HARIBISON, A LAWYER’S GUIDE TO ASCS ADMINISTRATIVE APPEALS AND JUDI-
through county (COC) and state committees (STC) and other officials at the county, state, and national levels.\textsuperscript{19}

The national office of the ASCS is authorized to issue instructions to its employees on the field administration of the federal farm programs.\textsuperscript{20} The ASCS's instructions to its employees on the payment limitations that are the subject of this article are found in the \textit{ASCS Handbook for State and County Offices} volume entitled “Payment Limitations” (“ASCS Handbook”).\textsuperscript{21} References to the \textit{ASCS Handbook} in the following discussion contain the date of the cited \textit{ASCS Handbook} amendment since the contents of the volume are amended from time to time.\textsuperscript{22} Furthermore, the contents of the \textit{ASCS Handbook} are periodically supplemented by notices to the county and state committees.\textsuperscript{23}
The governing statutes and regulations promulgated pursuant to those statutes determine the law of payment limi-

Deputy Administrator for State and County Operations (DASCO)  
USDA, ASCS  
P.O. Box 2415  
Washington, D.C. 20013

or inquiring at the:  
Information Division, ASCS  
Room 3702 South Building  
14th Street and Independence Avenue, S.W.  
Washington, D.C. 20250  
(202) 447-5875

The ASCS does not send private parties the ASCS Handbook amendments on a subscription basis. Accordingly, persons seeking to maintain a current version of the ASCS Handbook must make periodic requests; monthly requests are recommended.

24. The payment limitations that are the subject of this article are found at 7 U.S.C. §§ 1308 to 1308-2 (1988). Sections 1308 to 1308-2 govern the payment limitations for the annual income support programs for wheat, feed grains, upland cotton, extra long staple cotton, rice, honey, and certain other commodities.


The payment limitations for the CRP are found at 16 U.S.C. § 3834(f) (1988). Other less commonly encountered programs may have their own payment limitation provisions. For example, the Disaster Assistance Act of 1989 has its own payment-limitations provisions. See Pub. L. No. 101-82, § 109, 103 Stat. 564, 575 (1989) (to be codified at 7 U.S.C. § 1421). However, the focus of this article is on the limitations applicable to the annual commodity programs and, to a limited extent, the CRP.

25. The regulations for the payment limitations currently applicable to the annual commodity programs are found at 7 C.F.R. § 1497 (1990). Those regulations also apply to CRP contracts entered into on or after August 1, 1988. See 7 C.F.R. § 1497.1(c), (d) (1990) (For CRP contracts entered into on or after December 22, 1987, but before August 1, 1988, the person holding the contract may elect to have the provisions of § 1497 apply. Otherwise, the provisions of 7 C.F.R. § 795 (1990) apply.). See also Notice PL-22 (June 23, 1989) (discussing the applicability of §§ 795 and 1497 to CRP contracts).

In addition to the rules appearing in the 1990 Code of Federal Regulations, interim rules appear at 55 Fed. Reg. 1,557-76 (1990). The interim rules revise and amend various provisions in § 1497. They were published in the Federal Register on January 17, 1990, and became effective on that date. Although the interim rules apply only to the 1990 crop year, their requirements, in whole or in part, may be continued in the rules that will be promulgated to implement the payment-limitations provisions of the 1990 Farm Bill.

Prior to the adoption of the current regulations in § 1497, the payment limitations for annual commodity programs were found at 7 C.F.R. § 795 (1988). The rules there governed payment limitations prior to the 1989 crop year. See 53 Fed. Reg. 29,553 (1988) (listing the programs still subject to the payment-limitations rules
tations. The contents of the *ASCS Handbook* are merely the ASCS’s interpretation of the statutes and regulations. Nevertheless, the *ASCS Handbook* is important for several reasons and it is imperative that persons working with the payment-limitations rules consult the *ASCS Handbook* volume on payment limitations.

First, the *ASCS Handbook* reflects the ASCS’s current inter-

26. See Westcott v. United States Dep’t of Agric., 611 F. Supp. 351, 358 (D. Neb. 1984) (holding that two chapters of the *ASCS Handbook*, chapters CM-7 and CM-10 dealing with the reconstitution of farms, “are merely interpretive rules of regulations contained in the Code of Federal Regulations and as such are exempt from the notice and comment provisions of the Administrative Procedure Act” (citation omitted)), aff’d, 765 F.2d 121 (8th Cir. 1985); Thomas v. County Office Comm. of Cameron County, 327 F. Supp. 1244, 1253 (S.D. Tex. 1971) (noting the *ASCS Handbook* “cannot be accorded the dignity of a regulation having in substance the dignity of legislation,” and “it is not binding upon the parties [producers and the ASCS]” in judicial proceedings (citations omitted)); Graham v. Lawrimore, 185 F. Supp. 761, 764 (E.D.S.C. 1960) (“[H]andbook does not have the force and effect of the law.”), aff’d, 287 F.2d 207 (4th Cir. 1961); Hawkins v. State Agric. Stabilization & Conservation Comm., 149 F. Supp. 681, 686 (S.D. Tex. 1957) (“These Handbooks were not published in the Federal Register and were not intended by any officials in the Department of Agriculture to have the force or effect of regulations. They were intended only as general guides for the use of personnel in the administration of the cotton program.”), aff’d, 252 F.2d 570 (5th Cir. 1958); Hedman v. United States, 15 Cl. Ct. 304, 315 (1988) (Office administration chapter in the *ASCS Handbook* does not establish terms and conditions of employment of an ASCS county executive director because chapter “was promulgated merely to ‘instruct’ State and County offices on the procedures to be followed in office administration.”).

27. This article does not address a variety of matters associated with the administration of the payment-limitations rules covered in the *ASCS Handbook*. Those matters include, for example, “end-of-year reviews,” internal auditing and monitoring of payment-limitations determinations, the complete documentation requirements imposed on producers, the procedures followed for producers having interests in farming operations in more than one county, and the deadlines for the submission of information by producers. Accordingly, a complete assessment of a producer’s compliance with the payment-limitations rules cannot be made without reference to the *ASCS Handbook* and the supplementary PL-Notices.

The *ASCS Handbook* also includes copies of all of the forms producers must complete in connection with the payment-limitations rules, with instructions for their completion. Because the ASCS uses the information provided on those forms to
pretation of the statutes and regulations. Thus, the *ASCS Handbook* provides an accessible statement of the ASCS's policy on specific aspects of payment-limitations law.

Second, should judicial review of an adverse final determination by the ASCS on a payment-limitations matter become necessary, one can reasonably assume the government will argue that the *ASCS Handbook* interpretation of the law is correct. If the *ASCS Handbook* interpretation of the statutes and the regulations appears to be incorrect, being familiar with the *ASCS Handbook*’s interpretation prior to pursuing an administrative appeal allows one to develop the administrative record most favorably to challenge the *ASCS Handbook* interpretation.

Third, because the *ASCS Handbook* reflects the application of the ASCS’s “expertise” in interpreting the statutes and regulations, a court reviewing a final ASCS determination may give it some weight when the interpretation of the statutes or regulations is at issue. Accordingly, the *ASCS Handbook* interpretation of the statutes and regulations may be significant in judicial review of a final ASCS determination.

Fourth, the *ASCS Handbook* can be very useful because of its detailed explanations of the requirements of the payment-limitations statutes and regulations. In some instances, the *ASCS Handbook* may clarify the regulations or provide missing detail. In addition, the *ASCS Handbook* contains copies of the forms, contracts, and other documents producers must complete and sign.

Fifth, the basic source of information about the payment-limitations rules for ASCS county and state committees is the *ASCS Handbook*. The committee members and the county and state offices are far more likely to consult and base their deci-

make payment-limitations determinations, attorneys working with producers must be familiar with the current forms and the significance of the information requested.

28. Of course, the ASCS is free to change its interpretation of the payment-limitations statutes. *See, e.g.*, Chisholm v. F.C.C., 538 F.2d 349, 364 (D.C. Cir.) (“[A]n administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding.”), cert. denied sub nom., Democratic Nat’l Comm. v. F.C.C., 429 U.S. 890 (1976).

29. For discussion of the ASCS administrative appeals process, see infra notes 417-28 and accompanying text.

30. *See* Thomas v. County Office Comm. of Cameron County, 327 F. Supp. 1244, 1253 (S.D. Tex. 1971) (“The guidelines set out in the handbook are, however, to be accorded considerable weight by the Court in interpreting the meaning of [the statute at issue].”).
sions on the *ASCS Handbook* than the statutes or regulations. Therefore, in dealings with the county and state committees and offices, a working knowledge of the *ASCS Handbook* is critical.

The role and importance of the *ASCS Handbook* raises several concerns. Foremost is that the *ASCS Handbook*, rather than the regulations, is the guiding document for ASCS county and state offices. Accordingly, administrative decisions are premised on a document with which most attorneys are unfamiliar and which lacks the legal force and effect of regulations.

More significantly, there is no opportunity for public notice, scrutiny, or comment as the *ASCS Handbook* contents are issued, revised, or otherwise amended, because the contents of the *ASCS Handbook* are not subject to the notice and comment provisions of the Administrative Procedure Act. The absence of that opportunity means there is no forewarning of changes in the ASCS's interpretation of the law. Moreover, where the *ASCS Handbook* fills in gaps in the regulations, there is no check on the consistency of the *ASCS Handbook* contents with the provisions of the statute or the regulations.

II. THE PAYMENT-LIMITATIONS AMOUNTS

Of the three basic tasks assigned to payment-limitations law, the restriction of the amount of direct support a person may receive is historically the most fundamental. Since the first enactment of payment-limitations legislation in 1970, the restriction on the amount of payments a person may receive has been a consistent feature of payment-limitations law. Although

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32. For payment-limitations legislation enacted since 1970, see *infra* note 33. Certain "loans" and "purchases" are not subject to a payment limitation. *See* 7 U.S.C. § 1308(2)(B) (1988). In this context, "loans" and "purchases" refer to the forms of price support programs known as nonrecourse loans and government purchases.

Under the nonrecourse loan program, producers receive loans using their crop as collateral. The loan period is nine months for most crops. The producer is responsible for storage while a commodity is under loan.

The producer has the option of repaying the loan at the loan rate, or forfeiting the collateral, except when a marketing loan is in effect. The sum is normally expressed in terms of dollar amount per bushel. For a description of marketing loans, see *infra* note 47. As a nonrecourse loan, receipt of the forfeited crop is the government's only recourse if the loan is not repaid. *See* 7 U.S.C. § 1425 (1988). Section 1425 provides that a producer will not be liable for deficiencies resulting from the
the limitation amounts have varied, the underlying principle of a cap on payments has remained constant.


In 1973, the $55,000 limit was reduced to $20,000 for the 1974 to 1977 crop years by the Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, § 101, 87 Stat. 221 (1973).

The Rice Production Act of 1975, Pub. L. No. 94-214, § 103 (13), 90 Stat. 181, 186 (1976), imposed an annual $55,000 per person limit on payments for rice for the 1976 and 1977 crop years. That Act represents the first extension of payment limitations to programs for crops other than wheat, feed grains, and upland cotton.

The Food and Agriculture Act of 1977, Pub. L. No. 95-113, § 101, 91 Stat. 913, 917-18 (1977), increased the annual per person limit to $40,000 for the 1978 crop, and to $45,000 for the 1979 crop of wheat, feed grains, and upland cotton. The payment limitations for rice were set at $52,250 for the 1978 crop and $50,000 for the 1979 crop.


In essence, the 1987 amendments to the Food Security Act of 1985 replaced a single-tiered payment-limitations scheme with a two-tiered scheme. The second tier limited payments from certain programs that had not been limited in the 1985 Act. Those two limits, a $50,000 limit and a $250,000 limit, are currently in force for annual commodity program payments. However, the payments covered by those limits have been changed and a new, $75,000 limit has been added by the 1990 Farm Bill. S. 2830, 101st Cong., 2nd Sess. § 1111(a), 106 CONG. REC. H11,068-69 (1990) (amending § 1001 of the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1444-46 (to be codified at 7 U.S.C. §§ 1308 to 1308-3)). Thus, beginning with the 1991 crop year, three payment limits will be in effect for most commodities.

34. As a policy tool, capping is one of three options available to affect the distri-
For the 1989 and 1990 crop years, two “caps” apply. The first is a limit of $50,000; the second is a limit of $250,000.

The $50,000 limit caps only deficiency and land diversion payments. The deficiency and land diversion payments sub-

bution or redistribution of program benefits. The other options are “targeting” and “decoupling.” “Targeted” programs specify the program’s objectives and precisely define eligibility for program benefits. Under “decoupling,” income subsidies are not tied to current commodity production. Redistributing Benefits, supra note 7, at 3-4.

For purposes of this limitation, deficiency payments are those made to producers participating in the wheat, feed grains, upland cotton, extra long staple cotton, and rice programs as a form of income support. Currently, deficiency payments are made only when the nationally averaged market price for the commodity falls below the commodity’s “target price,” a pre-established sum, for the first five months of the marketing year. But see Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 1102, 104 Stat. 1388. Beginning with the 1994 crop year, deficiency payments may be calculated using the nationally averaged market price for twelve months rather than the current period of five months. The sum paid is based on the difference between the target price and the higher of the averaged market price or the loan level, the loan level being the per commodity unit sum for the nonrecourse loan extended to producers as a form of price support for the commodity. See 7 U.S.C.A. § 1445b-1(h)(1) (West 1988) (wheat); 7 U.S.C.A. § 1444d(b) (West 1988) (feed grains); 7 U.S.C.A. § 1444(g)(3) (West 1988) (upland cotton); 7 U.S.C.A. § 1444(h)(3) (West 1988) (extra long staple cotton); 7 U.S.C.A. § 1441(i)(2) (West 1988) (rice).

For an example of how to compute deficiency payments, assume the target price for corn is $3.03 per bushel. Also assume the average market price is $1.94, and the nonrecourse loan rate is $1.82.

In this example, the difference between the target price and the market price is $1.09. The difference between the target price and the loan rate is $1.21. Under the formula, the deficiency payment rate is the smaller of the two differences, $1.09. Basic Mechanisms, supra note 1, at 17.


Land diversion programs are distinguishable from set-aside and acreage-reduction programs in that the latter programs are conditions of eligibility for other benefits, such as loans and deficiency payments. Thus, the producer’s reward for the latter programs is indirect, the receipt of other program benefits. Meanwhile, the reward for land diversion is a direct payment. See 7 U.S.C.A. § 1445b-1(e)(1)-(4) (West 1988) (“set aside” authority for wheat); 7 U.S.C.A. § 1444d(e)(1)-(4) (West 1988) (“set aside” authority for feed grains); 7 U.S.C.A. § 1445b-1(e) (West 1988) (acreage reduction for wheat); 7 U.S.C.A. § 1444d(e) (West 1988) (acreage reduction for feed grains); 7 U.S.C.A. § 1444(g) (West 1988) (acreage reduction for upland cotton); 7 U.S.C.A. § 1444(h) (West 1988) (acreage reduction for extra long staple cotton); 7 U.S.C.A. § 1441(i) (West 1988) (acreage reduction for rice).

For purposes of payment limitations, CRP rental payments are not land diversion payments. CRP payments are subject to a separate $50,000 limit and, accord-
ject to that limit are those made under the annual programs for wheat, feed grains, upland cotton, extra long staple cotton, and rice.

In determining whether the $50,000 limit has been reached, all of the payments subject to that limit are totaled. Compu-

tations are to be done on a crop year basis. Thus, to deter-
mine whether the $50,000 limit has been reached, all of a "separate person's" deficiency (except "Findley Amendment payments") and land diversion payments for a crop year are totaled.

The $250,000 limit applicable to the 1989 and 1990 crop years is an overall limit on all annual program payments for wheat, feed grains, upland cotton, extra long staple cotton, and rice, including the deficiency and land diversion payments that are limited to $50,000. In addition, for the 1989 and

1. payments for resource adjustment (excluding land diversion payments) or public access for recreation;
2. disaster payments under an annual commodity program;
3. marketing loans or any other gain realized by a producer in repaying a loan at less than its original level under the programs for wheat, feed grains, upland cotton, rice, and honey;
4. Findley Amendment payments;
5. loan deficiency payments for wheat, feed grains, upland cotton, and rice; and
6. inventory reduction payments.

See 7 U.S.C. §§ 1308(2)(A), (B) (1988); see also 7 C.F.R. § 1497.3(b)(Payment) (1990) (defining "payment" with reference to specific farm programs); 55 Fed. Reg. 1,572 (1990) (technical amendment to the definition of "payment"). Payments received under these programs are combined in determining whether the $250,000 limit has been reached. The deficiency and land diversion payments, capped at $50,000, are also combined in determining the $250,000 limit. See infra notes 42-44 and accompanying text.

For explanations of marketing loans, Findley Amendment payments, and loan deficiency payments, see infra notes 47, 49, and 48, respectively. The Secretary is authorized to make resource adjustment or public access for recreation payments, in addition to land diversion payments for diverted acreage. The Secretary may also make payments for reduced and "set aside" acreage. Those payments may include funds for a share of the cost of approved soil and water conservation practices and

http://open.mitchellhamline.edu/wmlr/vol17/iss1/15
1990 crop years, the $250,000 limit caps payments made under other commodity programs, such as the programs for honey.\textsuperscript{41}

In determining whether the $250,000 limit has been reached for the 1989 and 1990 crop years, all of the payments subject to the $250,000 limitation and all of the payments subject to the $50,000 limit are totaled.\textsuperscript{42} In other words, the total receipt of all payments from the annual commodity programs specified in 7 U.S.C. section 1308(1) and (2) cannot exceed $250,000 per person.\textsuperscript{43} All computations are to be done on a payments to induce the producer to provide public access to the acreage for recreation. For an example of the authority for such payments, see 7 U.S.C.A. § 1444d(e)(6) (West 1988) (feed grains).

The disaster payments subject to the $250,000 limitation are those authorized by the various annual commodity programs. See 7 U.S.C.A. § 1445b-1(2) (West 1988) (wheat); 7 U.S.C.A. § 1444d(b)(2) (West 1988) (feed grains); 7 U.S.C.A. § 1444(g)(4) (West 1988) (upland cotton); 7 U.S.C.A. § 1441(i)(3) (West 1988) (rice). These payments are distinguishable from disaster payments which are authorized by separate, usually less frequently enacted, legislation, commonly containing its own limitation provision. For an example of such legislation, see the Disaster Assistance Act of 1989, Pub. L. No. 101-82, § 109(a), 103 Stat. 564, 575 (1989), which imposes a $100,000 limitation on its benefits. 7 C.F.R. § 1477.9(c) (1990).

Inventory reduction payments may be paid to producers who agree not to participate in the price support programs of nonrecourse loans and government purchases, even though they are eligible. In addition, the producers must also agree not to seek loan deficiency payments and to reduce their planted acreage of the program commodity by a specified amount.

Payments are made in the form of commodities, also known as "payments in kind" (PIK), or more recently, in the form of negotiable "generic PIK certificates" that can be used to redeem commodities or sold to others. Inventory reduction payments are authorized for wheat, feed grains, upland cotton, and rice. See 7 U.S.C.A. § 1445b-3(g) (West 1988) (wheat); 7 U.S.C.A. § 1444e(g) (West 1988) (feed grains); 7 U.S.C.A. § 1444-1(g) (West 1988) (upland cotton); 7 U.S.C.A. § 1441-1(g) (West 1988) (rice).

41. For a discussion of the limits applicable to honey payments beginning with the 1991 crop year, see infra note 51 and accompanying text.
43. CRP rental payments are not included in determining the $50,000 or $250,000 limit for annual commodity programs under 7 U.S.C. §§ 1308(1), (2). In other words, CRP payments are "in addition to, and [do] not affect, the total amount of payments" the owner or operator is otherwise eligible to receive. 16 U.S.C. § 3834(f)(3) (1988).

Under the CRP program, producers are paid for removing highly erosive cropland from production pursuant to competitive bids. The payments are made as yearly rent, usually under ten-year term contracts. In addition, cost-sharing payments may be made for the planting of conserving vegetation. See 16 U.S.C. §§ 3831-36 (1988); see generally Malone, \textit{A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and The Conservation Reserve}, 34 KAN. L. REV. 577 (1986); Malone, \textit{The Renewed Concern Over Soil Erosion: The Current Federal Programs and Proposals}, 10 J. AGRIC. TAX'N & L. 310, 339-49 (1989); McEown & Harl, \textit{A Look at the
crop year basis.\textsuperscript{44} For the 1991 to 1995 crop years, there will be three limits. A $50,000 limit will continue to apply to deficiency and land diversion payments made under the annual programs for wheat, feed grains, upland cotton, extra long staple cotton, and rice. In addition, the payments subject to the $50,000 limit will include deficiency and land diversion payments for oilseeds.\textsuperscript{45} However, certain payments made under the programs for wheat, feed grains, upland cotton, rice, and oilseeds will be subject to a new $75,000 limit.\textsuperscript{46}

The $75,000 limit, effective beginning with the 1991 crop year, will apply to marketing loan gains,\textsuperscript{47} loan deficiency pay-

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\textit{Conservation Reserve Program (CRP) and How It Affects Owners and Tenants of Marginal Land}, 12 J. AGRIC. TAX’N & L. 121 (1990).

CRP rental payments made to an owner or operator may not exceed $50,000 in any fiscal year. Cash payments and payments made in the form of negotiable commodity certificates are combined when computing the total amount of rental compensation. 16 U.S.C. § 3834(f)(1) (1988).

The 1990 Farm Bill contains a new provision relating to CRP payments when the land under contract changes ownership by way of devise or descent. The provision provides:

\textit{In General}

(a) Notwithstanding any other provision of law, in the event of a transfer of ownership of land (or an ownership interest in land) by way of devise or descent, the Secretary of Agriculture may, if the new owner succeeds to the prior owner's contract entered into under title XII, make payments to the new owner under such contract without regard to the amount of payments received by the new owner under any contract entered into under title XII executed prior to such devise or descent.

\textit{Limitation}

(b) Payments made pursuant to this section shall not exceed the amount to which the previous owner was entitled to receive under the terms of the contract at the time of the death of the prior owner.


44. 7 C.F.R. § 1497.1(b) (1990).


47. When implemented by the Secretary, the marketing loan programs authorized for wheat, feed grains, upland cotton, rice, and honey allow producers of those commodities to redeem their nonrecourse loans at less than the original loan rate. \textit{See} 7 U.S.C.A. § 1445b-3(a)(5) (West 1988) (wheat); 7 U.S.C.A. § 1444e(a)(4) (West 1988) (feed grains); 7 U.S.C.A. § 1444-I(a)(5) (West 1988) (upland cotton); 7 U.S.C.A. § 1441-1(a)(5) (West 1988) (rice); 7 U.S.C.A. § 1446(b)(2) (West 1988) (honey). The effect of this redemption is an additional subsidy to the producer. It is that gain which is subject to the $250,000 limit during the 1989 and 1990 crop years. For the 1991 to 1995 crop years, those payments (except for honey) are limited by the $75,000 cap.
ments, and "Findley Amendment payments." For the 1989 and 1990 crop years, Congress has limited those payments to $250,000.

For the 1991 to 1995 crop years, producers will compute the $50,000 limit in the same manner as for the 1989 and 1990 crop years. Producers will compute the $75,000 limit in the same manner as the $50,000 limit. In other words, the producer must total all payments subject to each respective limit, and do the computations on a crop year basis.

For the 1991 to 1995 crop years, the overall limit will remain at $250,000. However, honey and wool and mohair program payments will be subject to separate and more restrictive payment limits established under each of those programs.

48. Not to be confused with the deficiency payments discussed with respect to the $50,000 limit, loan deficiency payments are income support payments that essentially provide a subsidy to producers for not receiving a nonrecourse loan. Loan deficiency payments are authorized for wheat, feed grains, upland cotton, and rice, and they may be offered by the Secretary whenever a marketing loan for the commodity is in effect. See 7 U.S.C.A. § 1445b-3(b) (West 1988) (wheat); 7 U.S.C.A. § 1444e(b) (West 1988) (feed grains); 7 U.S.C.A. § 1444-1(b) (West 1988) (upland cotton); 7 U.S.C.A. § 1441-1(b) (West 1988) (rice).

The loan deficiency payment and marketing loans are computed in the same way, i.e., the difference between the original loan level and the lower loan rate. Thus, when a marketing loan is in effect, participants in the loan deficiency payment program effectively receive the same subsidy provided to the holders of nonrecourse loans. Although subject to the $250,000 limit during the 1989 and 1990 crop years, loan deficiency payments, including payments for oilseeds, are subject to the $75,000 limit for the 1991 to 1995 crop years.

49. "Findley Amendment payments" arise from the authority granted to the Secretary of Agriculture to lower the loan level for specified commodities in certain circumstances. See, e.g., 7 U.S.C.A. § 1445b-1(b)(1)(D) (West 1988) (wheat); 7 U.S.C.A. § 1444d(b)(1)(D) (West 1988) (corn). The lowering of the loan rate may result in an increase in the amount of the deficiency payment paid to the producer. The amount representing the increased portion of the deficiency payment, commonly referred to as the "Findley Amendment payment," is not subject to the $50,000 limitation.

To illustrate how a lowering of the loan rate might result in the payment of a "Findley deficiency" or Findley Amendment payment, assume the target price for corn is $3.03 per bushel. Also assume the basic loan rate is $2.28. If the deficiency payment is based on the difference between the target price and the basic loan rate, the deficiency payment before the lowering of the loan level would be $0.75.

If the Secretary lowered the loan rate to $1.82 per bushel under the authority of the Findley Amendment, the difference between the two loan rates would equal $0.46. Again assuming the deficiency payment is based on the difference between the target price and the loan rate rather than the average market price, $0.46 would be paid to the producer as the "Findley Amendment payment," and the total deficiency payment would equal $0.75 + $0.46, or $1.21 per bushel.

50. For a discussion of Findley Amendment payments, see supra note 49 and accompanying text.

51. Under the 1990 Farm Bill, the payment limits for marketing loan gains and
means for the 1991 to 1995 crop years, honey program payments will no longer be subject to the overall $250,000 limit.

In determining whether the $250,000 limit has been reached, all of the payments subject to that limitation and all of the payments subject to the $50,000 and $75,000 limits are totaled. Computations are to be made on a crop year basis.

Three observations may be made about the nature of the payment limits. First, more than one limit may affect an individual or entity, because an individual or entity may participate in more than one commodity program or may receive different forms of payment under programs for a particular commodity. Also, a person may increase the total amount of payments received by participating in programs capped at higher limits as well as in programs with payments capped at lower limits. However, the overall $250,000 limit applicable to the aggregate of payments received under the programs subject to the overall limit restricts increasing program payments in that manner.
Second, the three limits apply on a per person basis. Thus, the fact that a person may derive payments from more than one farming operation in which he or she participates is immaterial in determining whether the respective limit has been reached.

Third, consistent with their application on a per person basis, the limits apply to each individual or entity deemed to be a "separate person." Accordingly, if a person organizes or reorganizes his or her farming operation to increase successfully the number of $50,000 limits applicable to the operation as a whole, the number of applicable $250,000 limits will also increase. Each limit follows or applies to each "separate person," and the number of "separate persons" associated with a particular farming operation determines the number of limits applicable to that operation.55

Acquiring the status of a "separate person" is partially dependent on being deemed to be "actively engaged in farming." Accordingly, the discussion that follows examines that aspect of payment-limitations law.

III. THE "ACTIVELY ENGAGED IN FARMING" REQUIREMENT

A. The Significance of the Requirement

This section of the article begins a three-part discussion of the second feature of payment-limitations law, the limitation of payments to "persons" who are "actively engaged in farming." The discussion will examine the "actively engaged in farming" aspect of that limitation. The "person" aspect is the focus of Part IV of this article, and is followed in Part V by an evaluation of the application of the "actively engaged in farming" requirement to the various categories or classes of "persons," as that term is used in payment-limitations law.

55. As a related matter, individuals are limited in their ability to create entities through which they receive program payments. Those limitations are discussed infra in notes 351-91 and accompanying text. However, even under those rules, the payment limits can be effectively doubled.
An understanding of the “actively engaged in farming” requirement provides an essential foundation for a working knowledge of the payment-limitation rules. Accordingly, the following discussion is a core component of this article.

The “actively engaged in farming” requirement is significant for several reasons. First, being a “person” who is “actively engaged in farming” is a condition of eligibility for certain farm program payments.\(^56\)

Second, being “actively engaged in farming” is one of the elements of being a “separate person” for payment-limitations purposes. A “separate person” is eligible for program benefits in his, her, or its own right. The limitation may be characterized as an element of “separate person” status because limiting payments to “persons” who are “actively engaged in farming” is a condition of eligibility for program payments. However, being a “person” who is “actively engaged in farming” and being a “separate person” are not strictly synonymous. As will be discussed in the next part of this article, there are a number of circumstances in which a “person” who “is actively engaged in farming” is not considered a “separate person.”

Moreover, for some categories of “persons,” there are requirements other than being “actively engaged in farming.” These requirements must be met before “separate person” status can be achieved. Nevertheless, while being “actively engaged in farming” does not necessarily carry with it “separate person” status, the requirement constitutes a significant element of the “separate person” status.

“Separate person” status is important for two reasons. The first reason has already been mentioned—being a “separate person” means that “person” is eligible to receive program payments, assuming other program eligibility requirements have been satisfied.

The second reason for the importance of “separate person” status is that a “separate person” has a payment limitation independent of any other “person’s” payment limitation. The limits operate against a “person,” not a farming operation.

For each “person” in a farming operation who is a “separate person,” there is a corresponding increase in the number of

"persons" eligible for payments. There is also a corresponding increase in the number of payment limitations available to the operation as a whole.

To understand the significance of increasing the number of "separate persons" in a farming operation, assume a farming operation initially consists of one "separate person." If that "separate person" is receiving deficiency payments, those payments, exclusive of Findley Amendment payments, are capped at $50,000. If the farming operation has a productive capacity for generating more than $50,000 in deficiency payments, its operation by one "separate person" means the potential deficiency payments above the sum of $50,000 are unavailable because of the $50,000 limit to that person.

However, if another "separate person" is added to the operation, two changes occur. First, the additional "separate person" is eligible for deficiency payments. Second, the additional "separate person's" deficiency payments are subject to payment limitations that operate independently from the payment limitations applicable to the initial person. The net result is the two "separate person" farming operation can receive up to $100,000 in deficiency payments. Thus, from the perspective of the farming operation, it has doubled its potential for the receipt of payments by adding another "separate person."

In the broadest sense, to be a "person" who is "actively engaged in farming," one must first be a "person" as that term is defined in the applicable statute and regulations. That "person" must also be "actively engaged in farming" within the meaning of the statute and regulations.

The definitional rules for the "person" and "actively engaged in farming" requirements are more easily understood when approached with an appreciation for their importance and purpose. The following discussion adopts that approach.

B. The Reasons for the Requirement

The current statutory and regulatory restrictions on the receipt of farm program payments are largely a product of the amendments to the Food Security Act of 1985, known as the

57. For an explanation of Findley Amendment payments, see supra note 49.
58. See supra notes 35-39 and 45 and accompanying text.
Farm Program Payments Integrity Act of 1987. Those amendments were contained in the Agricultural Reconciliation Act of 1987, which was enacted as part of the Omnibus Budget and Reconciliation Act of 1987.\(^59\)

The amendments limiting payments to "active" farmers became effective beginning with the 1989 crop year.\(^60\) The primary concerns of the amendments were the use of entities to create additional "persons" and the disqualification of passive investors from eligibility to receive program benefits.\(^61\)

The legislation was influenced by a report prepared by the GAO.\(^62\) That report documented numerous abuses of then-current payment-limitations law.\(^63\)

The GAO found the most common abuse occurred when two producers who individually had reached their $50,000 payment limit either formed a corporation that qualified for its own, separate payment or added a new member to a partnership or joint venture who then qualified for a separate payment. In many instances, that new member was a passive participant in the operation.\(^64\)

\(^61\). See H.R. REP. No. 100-391(I), 100th Cong., 1st Sess. 5-16 reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 2313-1, 2313-14 to -16 [hereinafter HOUSE REPORT]. Whether the amendments have accomplished their purpose is another matter. Consider the following statement contained in a GAO report issued in April, 1990:

A recent USDA Inspector General audit, however, found that [the 1987 legislative] provisions and the USDA's implementing regulations, did not effectively curtail farm reorganizations. The audit reviewed 241 farm operating plans for 52 farming operations but did not identify any reduction in projected total program payments because of the 1989 [the first crop year in which the 1987 provisions became effective] payment limitation changes. Therefore, the report concluded that the 1987 amendments will not significantly limit program payments.


\(^63\). U.S. GEN. ACCOUNTING OFFICE, FARM PAYMENTS: BASIC CHANGES NEEDED TO AVOID ABUSE OF THE $50,000 PAYMENT LIMIT (Pub. No. RCED-87-176, 1987) [hereinafter BASIC CHANGES].

\(^64\). Id. at 21-22.
On relatively small acreage where crop production capabilities effectively limited the potential total of payments, the addition of members to partnerships or joint ventures was usually limited to one or two new members. However, on larger farming operations, other actions, such as the division and subsequent leasing of parcels of land, sometimes produced increases in the numbers of individuals or entities added to what was essentially a single farming operation.  

The GAO identified several then-applicable payment-limitations rules that permitted these abuses to occur. The first rule amenable to abuse was the rule for determining when a corporation would be considered a “separate person.” Then, as now, a “separate person” was eligible for payments in his, her, or its own right. Also, the payment limits were applied to that “person’s” payments independently from the application of those limits to any other “persons” involved in the same farming operation.

The then-existing rule for determining when a corporation would be considered a “separate person” allowed a corporation to be a “separate person” if no stockholder owned or controlled more than fifty percent of the stock.  A related rule allowed a corporation to be considered a “separate person” from any other corporation if the same two or more individuals did not own or control more than fifty percent of the stock in the corporations.

Under those rules, the GAO found by “using a combination of two stockholders per corporation, each of whom owns exactly 50 percent of the stock, three individuals—A, B, and C—[could] form three corporations—AB, BC, and AC. The three individuals and three corporations would then qualify for a to-

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65. *Id.* For an extraordinary example of the subdivision of a farm for the purpose of receiving more farm program payments, see Example 3 in *U.S. Gen. Accounting Office, Examples of USDA's Application of the $50,000 Payment Limitation 5-7* (Pub. No. RCED-86-29FS, 1985) [hereinafter EXAMPLES]. In that example, an actual situation found by the GAO in Colusa, California, sixteen thousand acres of rice were being leased to fifty-six tenants, eight of whom were related to the landlord. Those fifty-six tenants received a total of almost $1.5 million in farm program payments on that farm in 1984. The sum would have been even higher had not the payments for some of the tenants been reduced under the $50,000 limit because of payments received by those tenants as a result of their interests in other farms.

66. 7 C.F.R. § 795.8(a) (1988).

67. *See id.* § 795.8(b).
tal of six payments." 68

The GAO noted that members qualifying as "separate persons" could be added to joint operations such as general partnerships and joint ventures with similar ease. The then-applicable regulations provided that the individual members of joint operations were "separate persons," although the joint operation was not. 69 Accordingly, joint operations could increase the number of separate payments simply by adding new members.

The only restriction placed on the qualification of members for separate payment limits was the requirement that a member had to contribute to the farming operation either capital, land, equipment, labor, or management in proportion to the member's share of payments from the joint operation. 70 Because the proportional contribution of any one of the inputs was sufficient to satisfy the restriction, individuals who had contributed only capital, for example, were deemed to be "separate persons." In some instances, that capital may have

68. Basic Changes, supra note 63, at 21.

For another example, one documented in an earlier GAO report, consider the following:

Farmer A, a cotton farmer in Bailey County, Texas, owned or jointly owned four farms. In 1984, farmer A had 100-percent ownership of one farm and was joint owner on a 50/50 basis with his son on three corporate entities.

In 1984, farmer A participated in the cotton program on all four farms. The ASCS county officials determined the four farms were entitled to a maximum of $100,000 in farm program payments. Farmer A could receive up to $50,000 on the one farm he had 100-percent ownership in and an additional $50,000 could be paid for the three corporate entities farmer A and his son owned on a 50/50 basis. The county officials determined that the three corporate entities would be treated as one for payment purposes because the three farms had the same ownership. As a result, farmer A could receive a total of $75,000 in payments—$50,000 for his own farm and $25,000 for his 50-percent ownership on the three corporate entities.

Subsequently, in November 1984 farmer A reorganized the three corporations. Instead of sharing equally—50/50—with his son on all three corporate entities he reorganized each corporation to share 50/50 with his son on one, his brother on another, and his grand niece on the third. As a result, ASCS determined the three corporate entities now had separate ownership. As a result of the separate ownership, the ASCS county officials determined that each corporate farm could receive up to $50,000 in payments for 1985. As a result, farmer A could receive $50,000 on his own farm and $25,000 (50 percent ownership) on each of the three incorporated farms. Therefore, farmer A could receive $125,000 in total payments on the four farms.

Examples, supra note 65, at 2-3.

69. 7 C.F.R. § 795.7 (1988).

70. Id.
even been borrowed using the anticipated program payments as collateral.\textsuperscript{71}

The GAO also identified flaws in the basic definition of a "person" for payment-limitations purposes and the absence of an "actively engaged in farming" requirement for individual producers.\textsuperscript{72} The then-applicable regulations simply defined a "person" to be any individual or entity that first, had a separate and distinct interest in land or crop; second, exercised separate responsibility for that interest; and third, was responsible for farming costs related to the interest from a fund or account separate from that of any other individual or entity.\textsuperscript{73}

As a consequence of the relatively unrestrictive definition of a "person" for payment-limitations purposes, land that was generating payments at or near payment limits was often divided and cash leased to investors. In most instances, those investors contributed only capital to the operation, often borrowed against anticipated program payments, and the investors were not otherwise engaged in farming.\textsuperscript{74}

Other GAO reports, concerned with actual or potential abuses of existing rules or the ability of proposed payment-limitations rules to correct the abuses, preceded enactment of the Farm Program Payments Integrity Act of 1987.\textsuperscript{75} These reports of flaws in the then-applicable payment-limitations rules prompted Congress to enact legislation intended both to encourage and to require the ASCS to implement payment-limitations law to protect the integrity of the federal farm program system, a system whose basic function was to provide "an income 'safety net' for persons who depend on a profitable pursuit of agricultural product for their livelihood."\textsuperscript{76} That

\textsuperscript{71} Basic Changes, supra note 63, at 21-25; see also at 22-23 (offering an actual example of how the then-applicable rules permitted the increase in payments).

\textsuperscript{72} Id. at 22.

\textsuperscript{73} 7 C.F.R. § 795.3(b)(1) (1988).

\textsuperscript{74} Basic Changes, supra note 63, at 21-25.


legislative purpose permeates the current rules for determining who is a “person” considered to be “actively engaged in farming.”

To summarize the problems with payment-limitations law prior to 1987 as perceived by the GAO and, ultimately, by Congress, the following points may be made:

1. The annual farm commodity programs that were, and still are, subject to payment limitations are intended to support the income of those who “depend on a profitable pursuit of agricultural product for their livelihood.”

2. The payment-limitations rules that existed in 1987 and earlier years were not effective in distinguishing between those who “depend[ed] on a profitable pursuit of agricultural product for their livelihood” and those who did not.

3. One way in which the rules needed to be changed was to make the distinction between “active” producers, that is, those who are dependent on agriculture for their livelihood, and “passive” participants, in other words, those who are not financially dependent on agricultural production.

The law that emerged from the congressional recognition of the foregoing summary is embodied in the second feature of payment-limitations law; the limitation of payments to “persons” who are “actively engaged in farming.” An important aspect of that feature is the linking of “person” status with the “actively engaged in farming” requirement.

Prior to the enactment of 7 U.S.C. § 1308-1(b)(1) as a part of the Farm Program Payment Integrity Act of 1987, there was no statutory or regulatory requirement linking the status of “person” with an “actively engaged in farming” requirement apart from the rules applicable to members of joint operations.77 Moreover, for members of joint operations who sought “separate person” status, the requirement for reaching “actively engaged in farming” status allowed members to attain “separate person” status merely by contributing capital to the farming operation in proportion to their share of the oper-

Consequently, individuals and entities who were only passive investors, not otherwise engaged in the farming operation, could receive payments up to their separate payment limit.

The current law links the status of being a “person” with more restrictive requirements for being considered “actively engaged in farming” for all but a few special classes of individuals and entities. Those requirements are intended to ensure “separate persons” are, in fact, “actively engaged in farming.”

C. The Elements of the “Actively Engaged in Farming” Requirement

The “actively engaged in farming” requirement for most “persons” has three elements. Each element incorporates the concept of a contribution to the particular farming operation from which the “person” will derive program payments.

Using extreme shorthand, the total contribution requirement involves:

78. Id. § 795.7.
79. Because certain “special classes” of individuals are not subject to the general requirements to be considered “actively engaged in farming,” it should be noted that the following discussion in the text does not apply to all “persons.” For a discussion of those “special classes” consisting of landowners, family members, and sharecroppers, and applicable requirements, see infra notes 297-328 and accompanying text.
80. As previously explained in the text, attaining the status of a “separate person” is partially dependent upon the satisfaction of the requirements for being a “person” who is “actively engaged in farming.” This part of the article addresses only the “actively engaged in farming” aspect of that requirement. Who is a “person,” as that term is used in the law of payment limitations, is discussed in Part IV.

To reinforce the fact that requirements for being a “person” are linked to the “actively engaged in farming” requirement, the text in this part uses the term “person” when referring to who must be performing each element of the “actively engaged in farming” requirement. However, there are points in the text where it would be technically inaccurate to use the term “person” in this manner.

The technical inaccuracy involves the ability of “joint operations” to make, on behalf of its members, the required “significant contribution” of one or more of the inputs specified in the first element of the “actively engaged in farming” requirement. Joint operations are general partnerships, joint ventures, and similar organizations. Although an individual or an entity who is a member of a joint operation may be a “person,” a joint operation may not be a “person.” See infra notes 148-49 and accompanying text. Thus, it is not always precisely correct to limit the reference to who is to be the contributor of a “significant contribution” of inputs to a “person.” Any confusion resulting from this usage should be resolved by a reading of the text discussing the application of the “actively engaged in farming” requirements to members of joint operations. See infra notes 237-66 and accompanying text.
1. "significant contributions";
2. "commensurate contributions"; and
3. "at risk" contributions.

The meaning of these forms of contributions will be developed, but, the point to be made now is that the concept of "contributions" to the farming operation is central. Making "contributions" a benchmark is one way in which the "actively engaged in farming" requirement distinguishes between "active" and "passive" participants in farming operations.

The first element requires that a "person" make a "significant contribution" to the farming operation from which the payments are to be derived. In most circumstances, that contribution has two parts. The first is the "significant contribution" of one or more of three specified inputs, and the second is the "significant contribution" of one or more of two specified services.

On the inputs side, the qualifying contribution must be:
1. one or
2. a combination of any one or more of the following three inputs:
   a. capital;
   b. equipment; or
   c. land.

On the services side, most "persons" are also required to make a "significant contribution" to that farming operation of:
1. "active personal labor";
2. "active personal management"; or
3. a combination of the two.

The "significant contribution" requirement can be characterized as a two-sided equation. On the "left hand" side is the significant contribution of inputs. On the "right hand" side is the significant contribution of services.81

The second element is commonly referred to as the "commensurate contribution" requirement. In essence, the element requires that the "significant contributions" and any other qualifying contributions82 to the farming operation must

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81. See ASCS HANDBOOK, supra note 15, Exhibit 4, at 3, Example 1 (Sept. 20, 1988) (using the "left hand" and "right hand" side characterizations).
82. Certain contributions that do not meet the requirements for being "signifi-
be commensurate with the "person's" share of the profits or losses from the operation. In other words, a "person's" contributions to the operation must be reasonably proportional with that "person's" claimed share of the proceeds from the operation.

The third element of the "actively engaged in farming" requirement is that the contributions must be "at risk." That element is called the "at risk" requirement.

Thus, the general elements that must be satisfied to be a "person" who is "actively engaged in farming" may be summarized as follows:

1. A "person" who
2. makes a "significant contribution" of
   a. land, capital, equipment or a combination of any of the three; and
   b. "active personal labor," "active personal management," or a combination of the two; and
3. whose contributions are "commensurate" with that "person's" claimed share of the profits or losses of the operation; and
4. whose contributions are "at risk."

Of these elements, the "significant contribution" requirement is the most restrictive, and, not coincidentally, the most complex. The "significant contribution" element probably best serves or accomplishes the legislative purposes underlying the limitation of payments to "persons" who are "actively engaged in farming."

D. The First Element of the "Actively Engaged in Farming" Requirement: The "Significant Contribution" Requirement

The first element of the "actively engaged in farming" requirement is the "significant contribution" requirement. It is a two-part requirement. The first part requires the "significant contribution" of one or more inputs. The second part requires the single or combined "significant contribution" of two services.

The two parts of the "substantial contribution" requirement are best understood by bearing in mind three basic questions.

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"cant contributions" may nevertheless count toward the satisfaction of the "commensurate contribution" requirement. See infra notes 138-41 and accompanying text.
First, what input(s) and service(s) must be contributed? Second, how much of an input or service must be provided? And third, who must provide the input(s) and service(s)?

The answers to these three questions may be translated into three categories of requirements: definitional requirements, quantity requirements, and source requirements. The following discussion answers the three basic questions for each part of the "significant contribution" element in terms of the three categories of requirements.

1. The "Significant Contribution" of Land, Capital, or Equipment, or a Combination Thereof

   a. The Definitional Requirements

   Land, capital, and equipment are the alternative inputs making up the "significant contribution" requirement. To qualify as a "significant contribution," a particular item must fall within the definition prescribed for each input. Those definitions are as follows:

   Land is "farmland consisting of cropland, pastureland, wetland, or rangeland which meets the specific requirements of the applicable program." 83

   "Capital consists of the funding provided by an individual or entity to the farming operation in order for such operation to conduct farming activities . . . . Capital does not include the value of any labor or management which is contributed to the farming operation." 84

   "Equipment is the machinery and implements needed by the farming operation to conduct activities of the farming operation including machinery and implements involved in land preparation, planting, cultivating, harvesting, or marketing of the crops involved. Equipment also includes machinery and implements needed [for] conservation cover crops or conservation use acreage . . . ." 85

83. 7 C.F.R. § 1497.3(b)(Land) (1990); see also 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year amending other portions of the definition of "land").

84. 7 C.F.R. § 1497.3(b)(Capital) (1990); see also 55 Fed. Reg. 1,572 (1990) (interim rule applicable to 1990 crop year amending other portions of the definition of "capital").

85. 7 C.F.R. § 1497.3(b)(Equipment) (1990); see also 55 Fed. Reg. 1,572 (1990) (interim rule applicable to the 1990 crop year amending other portions of the definition of "equipment").
b. The Quantity Requirements

In addition to the definitional requirements, the contribution of land, capital, or equipment, or a combination of two or more of the three must meet other requirements. The most basic is that the contribution must be of a sufficient quantity to be "significant." Hence, that requirement may be called the "quantity" requirement.

When an input of land, capital, or equipment is contributed singly, that is, not in combination with any of the other three inputs, the input must have a value equal to at least fifty percent of the individual's or entity's commensurate share of one of the following:

1. for land, the total rental value of the land necessary to conduct the farming operation;
2. for capital, the total value of the capital necessary to conduct the farming operation; and
3. for equipment, the total rental value of the equipment necessary to conduct the farming operation. 86

When the contribution consists of a combination of one or more of the specified inputs, the combined value of the inputs must equal thirty percent of the "person's" commensurate share of the total value of the farming operation. 87 The "total value of the farming operation" is the "total of the costs, excluding the value of active personal labor and active personal management which is contributed by a 'person' who is a member of the farming operation, needed to carry out the farming operation for the year for which the determination is made." 88

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88. 7 C.F.R. § 1497.3(b)(Total Value of the Farming Operation) (1990); see also ASCS HANDBOOK, supra note 15, Exhibit 4, at 1 (Jan. 18, 1989) (defining "Total Value of the Farming Operation"). For the definition of a "farming operation," see 7 C.F.R. § 1497.3(b)(Farming Operation) (1990) ("A farming operation is a business enterprise engaged in the production of agricultural products which is operated by an individual or entity which is eligible to receive payments, directly or indirectly, under one or more of the programs specified in § 1497.1."); 55 Fed. Reg. 1,572-73 (1990) (interim rule applicable to the 1990 crop year amending 7 C.F.R. § 1497.3(Farming Operation)) (adding the following to the existing definition: "An entity or individual may have more than one farming operation if such individual or entity is a member of one or more joint operations.").
Following is an example of the calculations involved in determining whether a "person's" contribution of an input has satisfied the quantity requirements. In this example, it is not necessary to use the "30% rule" applicable to combined contributions. However, had it been necessary, that computation is offered at the end of the example.

Example 1

Partnership ABC has three equal partners, A, B, and C. The partnership farms 2,000 acres, all having a rental value of $42 per acre.

Partner A contributes the following:
1. land having a total rental value of $24,000;
2. equipment having a rental value of $12,000; and
3. capital in the sum of $12,000.

Partner B contributes the following:
1. land having a total rental value of $12,000;
2. equipment having a rental value of $12,000; and
3. capital in the sum of $24,000.

Partner C contributes the following:
1. land having a total rental value of $12,000;
2. equipment having a rental value of $12,000; and
3. capital in the sum of $24,000.

The partnership (ABC) contributes the following:
1. land having a total rental value of $36,000;
2. equipment having a rental value $21,000; and
3. capital in the sum of $99,000.

Based on these facts, the determination will be as follows:

The rental value of all of the land involved in the farming operation is $84,000. This is derived by adding the rental value of all of the land contributed by the individual partners and the partnership ($24,000 + $12,000 + $12,000 + $36,000 = $84,000).

A significant contribution of land for each of the partners is equal to approximately $14,000. This is derived by determining each partner’s share of the to-
tal rental value of the land and dividing that share by 50% ($84,000 × 1/3 share for each partner × 50%).

In addition to their respective individual contributions of land, each partner made a prorated contribution of land through the partnership’s contribution. The partnership made a contribution of land equal to $36,000, which when each partner’s share of the $36,000 ($12,000) is added to the individual contributions of $24,000, $12,000, and $12,000, gives partner A $36,000 and partners B and C $24,000 each.\(^9\)

Thus, each of the partners has made a significant contribution of land because each has contributed land with a rental value greater than $14,000.\(^90\)

The same steps are involved in determining a significant contribution of equipment for each partner. Totaling all of the rental values for the equipment contributed, the result is $57,000 ($12,000 from each of the three partners and $21,000 from the partnership). Dividing that sum by one-third and again by one-half, a significant contribution for each of the partners is equal to approximately $9,500. When each partner’s individual contribution is added to his or her share of the partnership’s contribution, each partner has satisfied the significant contribution of equipment requirement by contributing the equivalent of $19,000 ($12,000 + $7,000 = $19,000).\(^91\)

The same steps are also involved in determining a significant contribution of capital for each partner. A significant contribution of capital for each of the partners is equal to $26,500 ($159,000 × 1/3 share for each

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\(^9\) The contribution of inputs by joint operations, including partnerships, are subject to the same source requirements as apply to individuals and entities. See infra notes 95-101 and accompanying text. For a discussion of the “significant contribution” of inputs by a joint operation in partial satisfaction of the “actively engaged in farming” requirement by the members of that joint operation, see infra notes 237-66 and accompanying text.

\(^90\) The partnership has not made a significant contribution of land because it has not contributed the requisite fifty percent of the total, a sum that would be $42,000. See 7 C.F.R. § 1497.3(b)(Significant Contribution)(1)(i) (1990).

\(^91\) The partnership has not made a significant contribution of equipment because it has not contributed the requisite fifty percent of the total, a sum that would be $28,500. See id.
each partner \( \times 50\% \)). Individual shares are added to each individual's share of the partnership contribution of capital resulting in partner A contributing a total of $45,000, and partners B and C each contributing $57,000. Thus, each partner made a significant contribution of capital.\(^92\)

In this example, if it had been necessary to use the "30% rule"\(^93\) applicable to contributions of combinations of land, equipment, or capital to determine whether the contribution of inputs satisfied the significant contribution requirement, each partner would have had to have contributed a combination of capital, land, or equipment with a value equal to $30,000. That figure is based on a $300,000 total value of the farming operation and equals thirty percent of each partner's one-third share.\(^94\)

c. The Source Requirements

In addition to the definitional and quantity requirements, there are several other requirements that may be categorized as "source" requirements. These requirements pertain to the source of contributions from the individual contributors and, in turn, to the farming operation as a whole.

In other words, the "source" requirements relate, first, to the contributor's acquisition of the input and, second, to the passing of the input from the contributor to the farming operation. Although, in that sense, the source requirements are broadly two-fold, there are three specific requirements.

The first and most straightforward source requirement is that the contribution of all three inputs, either singly or in combination, must be made "directly" to the farming operation from which the "person's" program payments will be

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92. This example was derived from an example set forth in the ASCS HANDBOOK, supra note 15, Exhibit 4, at 4 (Jan. 18, 1989) which ambiguously states the "total amount of capital" figure is "arrived at by taking the total expenditures necessary to conduct this farming operation and subtracting any equipment and land costs that will be expended by the partnership." Assumably, the reference to the "partnership" includes the individual partners as well.


94. See ASCS HANDBOOK, supra note 15, Exhibit 4, at 1-3, Example 1 (Sept. 20, 1988). Other examples are also provided in Exhibit 4.
derived.95

With respect to land and equipment, the second source requirement is that the land and equipment must be owned or leased by the “person”96 making the contribution.97 Land or equipment may be leased from any source. However, if the land or equipment is leased “from another individual or entity with an interest98 in the farming operation, [it] must be leased at fair market value.”99

For a contribution of capital, which may be “a direct out-of-pocket input of a specified sum or an amount borrowed by the

95. 7 C.F.R. §§ 1497.3(b)(Land)(2), 1497.3(b)(Capital)(1), 1497.3(b)(Equipment)(1) (1990); see also 55 Fed. Reg. 1,572-73 (1990). For joint operations, the joint operation may make the contribution of inputs. However, that contribution must also be a “direct” one. See ASCS HANDBOOK, supra note 15, ¶ 50B1, at 42 (Apr. 12, 1989) (Land); id. ¶ 50B2, at 42.5 (Mar. 28, 1989) (Capital); id. ¶ 50B3, at 43 (Mar. 28, 1989) (Equipment). For a discussion of the “significant contribution” of inputs by a joint operation in partial satisfaction of the “actively engaged in farming” requirement by the members of that joint operation, see infra notes 237-66 and accompanying text.

96. In joint operations, the joint operation may be the owner or lessee of the land or equipment. For a discussion of the “significant contribution” of inputs, including land and equipment, by the joint operation in partial satisfaction of the “actively engaged in farming” requirement by the members of the joint operation, see infra notes 237-66 and accompanying text. However, the same second source requirements apply.

For a discussion of the limitations on the “significant contribution” of leased land and equipment, see infra notes 97-99 and accompanying text. When the acquisition of the land or equipment was made with borrowed funds, a third source requirement, referred to in this article as the “financing rule,” applies. See infra notes 103-16 and the accompanying text.

97. See 7 C.F.R. §§ 1497.3(b)(Land)(1), 1497.3(b)(Equipment)(1) (1990); see also 55 Fed. Reg. 1,572-73 (1990). The regulations specifically refer only to the contributor’s “acquisition” of the contributed land and equipment. Assumably, the acquisition of land and equipment would be through purchase, gift, or lease. The acquisition of land and equipment may also be subject to a third source requirement, also known as the “financing rule.” See infra notes 103-16 and accompanying text.

98. The ASCS Handbook adds “or joint operation” to the listing after “individual” and “entity.” See ASCS HANDBOOK, supra note 15, ¶ 50B1, at 42 (Apr. 12, 1989) (Land); id. ¶ 50B3, at 42.7 (Apr. 12, 1989) (Equipment). For a discussion of the meaning of the word “interest” in the context of the phrase “interest in the farming operation,” see infra notes 114-16 and accompanying text.

99. 7 C.F.R. §§ 1497.3(b)(Land)(3), 1497.3(b)(Equipment)(3) (1990); see also 55 Fed. Reg. 1,572-73 (1990). In addition, for land, a cash lease must actually be paid on or before the “status date” of the current year. See ASCS HANDBOOK, supra note 15, ¶ 50B1, at 42 (Apr. 12, 1989). For the definition of “status date,” see infra notes 343-45 and accompanying text.

For equipment, if the equipment is leased “[b]y the hour, day, or acre, payment must be made within thirty days after the equipment is used.” ASCS HANDBOOK, supra note 15, ¶ 50B3, at 42.7 (Apr. 12, 1989). If leased on an annual basis, the lease must be paid on or before the status date of the current year. Id.
individual or entity,”100 the second source requirement is that
the capital “must be contributed directly to the operation by
the individual or entity from a fund or account separate and
distinct from that of any other individual or entity involved in
the farming operation.”101 In this context, it is immaterial
whether the other individual(s) or entity102 involved in the op-
eration qualifies as a “person.”

For all three inputs, there may be a third source require-
ment. This requirement is generally referred to as the “financ-
ing rule” because it disqualifies contributions of land, capital,
and equipment for purposes of the significant contribution re-
quirement when the land, capital, or equipment is acquired
through certain proscribed forms of financing.

The “financing rule” applicable to joint operations arises
out of the Farm Program Payments Integrity Act of 1987, en-
acted as part of the Omnibus Budget and Reconciliation Act of
1987.103 The relevant portions of that legislation became ef-

100. 7 C.F.R. § 1497.3(b)(Capital) (1990); 55 Fed. Reg. 1,572 (1990). When the
capital is borrowed and more than one individual or entity is participating in the
farming operation, a third source requirement, also referred to in this article as the
“financing rule,” applies. See infra notes 103-16 and accompanying text.

101. 7 C.F.R. § 1497.3(b)(Capital) (1990); 55 Fed. Reg. 1,552 (1990); see also
ASCS HANDBOOK, supra note 15, ¶ 50B2, at 42.5-.7 (Mar. 28, 1989). In joint op-
erations, the joint operation may make the contribution of capital. For a discussion of
the “significant contribution” of inputs, including capital, by the joint operation as
partially satisfying the “actively engaged in farming” requirement for members of
joint operations, see infra notes 237-66. However, the same second source require-
ment applies. See ASCS HANDBOOK, supra note 15, ¶ 50B, at 42.5 (Mar. 28, 1989).
For a discussion of the limitations applicable to borrowed capital (the “financing
rule”), see infra notes 103-16 and accompanying text.

102. 7 C.F.R. § 1497.3(Entities) (1990) defines an “entity” as follows:

An entity is a corporation, joint stock company, association, limited partner-
ship, irrevocable trust, revocable trust, estate, charitable organization, or
other similar organization including any such organization participating in
the farming operation as a partner in a general partnership, a participant in
a joint venture, a grantor of a revocable trust, or as a participant in a similar
organization.

Id.; see also ASCS HANDBOOK, supra note 15, Exhibit 2, at 2 (Oct. 26, 1988) (defining
“Entity”).

phrase “financing rule” may have different meanings in contexts other than its use in
this article. For example, prior to the 1989 crop year, the ASCS used the phrase
“financing rule” to refer to proscriptions against certain financing arrangements that
it contended were primarily embodied in 7 C.F.R. §§ 795.3, 795.7 (1988). One of
these regulations, 7 C.F.R. § 795.3, in effect prior to the 1989 crop year, required
that in order to be considered a “separate person” for payment-limitations purposes,
an individual or other legal entity must:
effective beginning with the 1989 crop year.\textsuperscript{104} However, in the applicable regulations, the "financing rule" for the 1989 crop year is stated differently than it is for the 1990 crop year.\textsuperscript{105}

As a result of the differences in wording, the proscription constituting the "financing rule" is broader for the 1990 crop year than for the previous crop year. However, the prefatory comments to the interim rules establishing the "financing rule" as the third source requirement for the 1990 crop year state that the purpose for the change in wording was to "clarify" the proscription.\textsuperscript{106}

For the 1989 crop year, the "financing rule" applies when

1. Have a separate and distinct interest in the crop or the land on which the crop is produced;
2. Exercise separate responsibility for such interest; and
3. Be responsible for payment of the cost of farming related to such interest from a fund or account separate from that of any other individual or entity.

\textit{Id.}

The other regulation, 7 C.F.R. § 795.7, prohibited individuals and entities who were members of general partnerships or other forms of joint operations from being deemed to be "separate persons" when those individuals sought to qualify for that status based on a contribution of capital acquired as a result of (a) a loan made to the joint operation, (b) a loan which was made to such individual or other legal entity by the joint operation or any of its members or related entities, or (c) a loan made to such individual or other legal entity which was guaranteed by the joint operation or any of its members or related entities.

\textit{Id.}

These provisions formed the primary basis for the ASCS assertion of financing rules issued in Notice CM-75 on December 2, 1986. An aspect of those "financing rules" was litigated in\textit{Justice v. Lyng, 716 F. Supp. 1567, 1569 (D. Ariz. 1988), and in Justice v. Lyng, 716 F. Supp. 1570, 1576 (D. Ariz. 1989). There, the court found that the Secretary's application of that aspect of the "financing rules" was arbitrary and capricious.\textsuperscript{104} See Agricultural Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-14 (to be codified at 7 U.S.C. § 1302); see also 7 C.F.R. § 1497.1(a)(1) (1990) (providing that 7 C.F.R. § 1497 is applicable to the "annual price support and production adjustment programs for the 1989 and subsequent crops of wheat, feed grains, upland cotton, extra long staple cotton, and rice . . . ").\textsuperscript{105}

\textit{Id.}

The differing statements of the requirement for the 1989 and 1990 crop years are set forth, infra, in the text accompanying notes 111-13.

It is reasonable to assume the rule in effect for the 1990 crop year will be continued for the 1991 to 1995 crop years. However, because new regulations under the 1990 Farm Bill have not yet been promulgated, the following discussion will be limited to the rules for the 1989 and 1990 crop years.\textsuperscript{106} 55 Fed. Reg. 1,559 (1990).
the farming operation "consists of more than one individual or entity."\textsuperscript{107} For the 1990 crop year, the rule applies in two instances. First, it applies when more than one individual, joint operation, or entity has an interest in the farming operation of the contributor of the inputs, or the contributor has an interest in the farming operation of another individual, joint operation, or entity.\textsuperscript{108} Second, it applies when the farming operation is conducted by a joint operation and the specified input or inputs are contributed by the joint operation.\textsuperscript{109}

For the 1989 crop year, when the operation consists of more than one individual or entity, the third requirement that must be met for the contribution to qualify as a significant contribu-

\textsuperscript{107} 7 C.F.R. §§ 1497.3(b)(defining Land, Equipment, and Capital) (1990). Thus, the third source requirement for land, equipment, and capital applies where the operation is a "joint operation." It affects contributions of land, equipment, or capital made by a member of the joint operation and to contributions made by the joint operation. Accordingly, the "joint operation" is included with "individual" and "entity" in the listing of the proscribed forms of acquisition by loan.

Thus, for the 1989 crop year the contributed land, capital, or equipment or those inputs in combination must not have been acquired as a result of a loan made to, guaranteed by, or secured by:

(A) Any other individual, joint operation, or entity that has an interest in the farming operation.

(B) The individual, joint operation, or entity by any other individual, joint operation, or entity that has an interest in the farming operation.

(C) Any other individual, joint operation, or entity in whose farming operation this individual, joint operation, or entity has an interest.


For the 1990 crop year, the proscribed loan arrangements also apply where the operation is a "joint operation" and the inputs are contributed by a member of the joint operation. See 55 Fed. Reg. 1,572-73 (1990). In addition, they apply when the inputs are contributed by the joint operation itself. See supra note 89 and accompanying text. For a more detailed discussion of the application of the "actively engaged in farming" requirement where a joint operation is involved, see infra notes 237-66 and accompanying text.

\textsuperscript{108} Specifically, the regulations governing the 1990 crop year provide that requirements characterized in this article as the "third source requirement" apply "to a farming operation conducted by an individual, a joint operation in which the capital is contributed by a member of the joint operation under the provisions of [7 C.F.R.] § 1497.8(b), or entity . . . ." 55 Fed. Reg. 1,572-73 (1990) (interim rules applicable to the 1990 crop year (to be codified at 7 C.F.R. § 1497.3(b)) (definitions for Land, Equipment, and Capital)). However, as is explained in the text that follows, the requirements only apply when another individual, joint operation, or entity has an interest in the contributor's farming operation or the contributor has an interest in another farming operation.

\textsuperscript{109} 55 Fed. Reg. 1,572-73 (1990) (interim rules applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.5(b) (definitions for Land, Equipment, and Capital)).
tion is that the contributed land, capital, or equipment must not have been acquired as a result of a loan made to:

i. the farming operation in which the individual or entity\(^ {110} \) has an interest;

ii. such individual, entity, or farming operation by the farming operation or any of its members, beneficiaries, or related entities;

iii. such individual, entity, or farming operation, which was guaranteed or secured by the farming operation or any of its members, beneficiaries, or related entities.\(^ {111} \)

For purposes of this limitation, a “related entity is an entity in which a member of a farming operation, which consists of two or more entities, has an interest, either directly or indirectly.”\(^ {112} \)

For the 1990 crop year, the individual, joint operation, member of the joint operation, or entity conducting the farm-

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110. The references to individuals and entities in listings (i), (ii), and (iii) may also be read to mean “persons” in the context of this discussion. In this part, the discussion assumes the referenced individuals and entities are “persons.”

For the 1989 crop year, a farming operation “is a business enterprise engaged in the production of agricultural products which is operated by an individual or entity which is eligible to receive payments, directly or indirectly, under one or more of the programs specified in § 1497.1.” 7 C.F.R. § 1497.3(b)(Farming Operation) (1990).

Interim rules applicable to the 1990 crop year added a second sentence to that definition: “An entity or individual may have more than one farming operation if such individual or entity is a member of one or more farming operations.” 55 Fed. Reg. 1,572-73 (1990).

111. 7 C.F.R. §§ 1497.3(b)(Land)(1)(i)-(iii), 1497.3(b)(Capital)(1)(i)-(iii), 1497.3(b)(Equipment)(1)(i)-(iii) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 50B1, at 42-42.4 (Apr. 12, 1989 & Mar. 28, 1989) (Land); id. ¶ 50B2, at 42.5-7 (Mar. 28, 1989) (Capital); id. ¶ 50B3, at 42.7-44 (Mar. 28, 1989) (Equipment).

The reach of this proscription is broad. Land acquired by contract for deed, deed of trust, land contract, or similar arrangement is considered to be acquired as the result of a loan. Thus, land so acquired is subject to the proscription. ASCS HANDBOOK, supra note 15, ¶ 50B1, at 42.4 (Mar. 28, 1989).

In addition, if any capital was borrowed by an individual or entity from any other member of the farming operation, or the farming operation itself, leased land will not be considered to be a “significant contribution” unless the individual or entity can show that sufficient capital was available from another source to pay the lease. Id.

A similar rule applies to the leasing of equipment. However, the rule regarding the use of borrowed money to lease equipment does not apply to the occasional exchange of equipment “if each producer has adequate equipment, through ownership or lease, to conduct its own farming operation in a manner normally acceptable for the area.” ASCS HANDBOOK, supra note 15, ¶ 50B3, at 44 (Mar. 28, 1989).

112. 7 C.F.R. § 1497.3(b)(Related Entity) (1990); see also ASCS HANDBOOK, supra note 15, Exhibit 2, at 5 (May 19, 1989) (defining a “related entity” as “[a]n entity in which a member of a farming operation, which consists of [two] or more entities, has an interest, either directly or indirectly”).
ing operation and making the contribution must not have acquired the land, capital, or equipment as a result of a loan made to, guaranteed, or secured by:

i. any other individual, joint operation, or entity that has an interest in such farming operation;

ii. such individual, joint operation, or entity by any other individual, joint operation, or entity which has an interest in such farming operation; or

iii. any other individual, joint operation, or entity in whose farming operation such individual, joint operation, or entity has an interest.\(^{113}\)

For both the 1989 and 1990 crop years, a critical aspect of the proscriptions embodied in the "financing rule" turn on whether the individual, joint operation, or entity making, guaranteeing, or securing the loan has an "interest in the farming operation" involved. Although the regulations do not define the phrase "interest in the farming operation,"\(^{114}\) a definition is offered in the ASCS Handbook. There, the term is awkwardly defined as follows:

Interest in the farming operation includes interests [sic], such as:

A. Any producer who shares in the production or proceeds of the production from the farming operation.

B. Landlords, including landowners, having an interest in the farming operation containing the acreage owned or leased, whether or not the landlord has an interest in the production or proceeds from the production.

C. General partner of a limited partnership where the limited partnership is a producer in the farming operation.

D. Grantor of a revocable trust where the trust is a producer in the farming operation.

Not having an interest in a farming operation are interests [sic], such as:


\(^{114}\) The omission of the definition of the phrase "interest in the farming operation" in the regulations illustrates the disadvantage the ASCS imposes on producers and their attorneys in deciphering the payment-limitations rules and requirements. It also illustrates the importance of consulting the ASCS Handbook in analyzing the payment-limitations rules. However, in the case of the ASCS Handbook definition of the phrase "interest in the farming operation" set forth in the text that follows, consulting the ASCS Handbook may shed little light on the issue at hand.
A. Stockholders in a corporation where the corporation is a producer in the farming operation.
B. Limited partners of a limited partnership where the limited partnership is a producer in the farming operation.
C. Members of an association where the association is a producer in the farming operation.
D. Heirs to an estate where the estate is a producer in the farming operation.
E. Beneficiaries of a trust where the trust is a producer in the farming operation.
F. Grantors of an irrevocable trust where the trust is a producer in the farming operation.
G. Trustees and personal representatives of a trust or estate where the trust or estate, respectively, is a producer in the farming operation.115

The Handbook definition of an “interest in the farming operation” is a model of defining a term with the term itself. Its extraordinary imprecision renders it nearly useless and effectively raises more doubt as to the meaning of the phrase.116 Nevertheless, the definition offered in the Handbook is the only explicit guidance supplied by the ASCS for the meaning of “interest in the farming operation.”

To summarize, the “significant contribution” of inputs requirement represents the first part of the two-part “significant contribution” requirement. Under it, a “person” wishing to be considered “actively engaged in farming” must make a contribution of land, capital, or equipment. Alternatively, a contribution of any combination of those inputs may be made.

There are three basic requirements applicable to the “significant contribution” of land, capital, or equipment. Those requirements have been described here as definitional requirements, quantity requirements, and source requirements.

All of the requirements serve to promote the legislative purposes of Farm Program Payments Integrity Act of 1987. In

116. For example, it is exceedingly difficult, if not impossible, to determine beyond doubt what is meant by: “Interest in the farming operation includes interests, such as . . . [l]andlords, including landowners, having an interest in the farming operation containing the acreage owned or leased, whether or not the landlord has an interest in the production or proceeds from the production.” ASCS HANDBOOK, supra note 15, Exhibit 2, at 3 (Mar. 28, 1989) (Interest in Farming Operation) (emphasis added).
particular, the quantity requirements, together with the limitation on the source of the financing for the acquisition of land, equipment, and capital, are responses to the concerns expressed by the GAO in its 1987 report to Congress on the abuses effected through the use of passive investors under the then-current payment-limitations rules. The quantity requirements and the limitation on the source of the financing of the acquisition of land, capital, and equipment are intended to correct that situation.

2. The "Significant Contribution" of "Active Personal Labor" or "Active Personal Management" or a Combination of the Two

As previously noted, the first element of the "actively engaged in farming" requirement involves the "significant contribution" of certain inputs and services. The preceding section discussed the input side of the "significant contribution" equation. This section will discuss the services side.

As with the input side of the "significant contribution" equation, the rules for the services side may be approached by asking certain basic questions. The answers to these questions may then be translated into the specific requirements governing the services side. First, what service(s) must be contributed? Second, what quantity of services is required?

Specifically, the requirements include definitional and quantity requirements. In contrast to the list for the significant contribution of inputs, this list of questions and requirements does not include the question "who must contribute the services?" and corresponding source requirements. Its absence is explained by the incorporation of the source requirements into the definitional requirements. By definition, the services must be provided to the farming operation by the "person" seeking to qualify as being "actively engaged in farming."

The services side of the "significant contribution" requirement is an attempt to require recipients of program payments to be personally involved in their farming operations. The GAO, in its report submitted to Congress prior to the enactment of the Farm Program Payments Integrity Act of 1987, noted its approval for a USDA proposal to make the "actively engaged in farming" requirement a condition for eligibility for payments. The GAO further noted that the proposal would enhance the effectiveness of the existing payment-limitations rules by requiring recipients to demonstrate active personal involvement in farming operations.

117. See Basic Changes, supra note 63, at 21-27. The quantity requirements and the limitation on the source of the financing of the acquisition of land, capital, and equipment are intended to correct that abuse.
engaged in farming” requirement a combination of the “significant contribution” of one or more inputs and the “significant contribution” of “active personal labor” or “active personal management” or a combination of the two. At the time of the report, the requirements for contributions called for a contribution of land, capital, equipment, labor, or management only in the alternative. The GAO’s approval of the proposed change was based on the expectation that more stringent requirements for meeting “actively engaged in farming” status would eliminate “the advantage of incorporating or adding members to a joint operation to avoid the limit.”

Combining the contributions of inputs and services under the “significant contribution” requirement produced largely parallel criteria on each side of the resulting equation. The similarity between the specific requirements for satisfying the “significant contribution” of inputs and the “significant contribution” of the services or labor and management extends to include both specific definitional and quantity requirements.

The most notable feature of the two requirements is the implicit exclusion of hired labor and hired management in the definitional requirements for both “active personal labor” and “active personal management.” Thus, the overall emphasis is on the personal fulfillment of the required labor and management activities.

There are essentially two specific requirements under the overall requirement of a “significant contribution” of “active personal labor” or “active personal management” or a combination of the two. The first is definitional in nature, and the second pertains to the quantity of labor and management that must be contributed in order to be “significant.”

a. The Definitional Requirements

“Active personal labor” is “personally providing physical activities necessary in a farming operation, including activities involved in land preparation, planting, cultivating, harvesting,
and marketing of agricultural commodities in the farming operation."  

121 "[T]he items listed [in the definition] are not inclusive but rather are indicative of the type of activities that are considered to be active personal labor."  

122 The use of the word "personal" is intended to preclude hired labor.  

123 "Active personal management" is personally providing either the "general supervision and direction of activities and labor involved in the farming operation" or the provision of services, either on or off-site, "reasonably related and necessary to the farming operation...".  

124 The use of the word "personal" in the definition serves to exclude hired management.  

125 The "reasonably related and necessary" services referred to in the definition are broadly stated and may include the following:

i. Supervision of activities necessary in the farming operation, including activities involved in land preparation, planting, cultivating, harvesting, and marketing of agricultural commodities, as well as activities required to establish and maintain conserving cover crops or conserving use acreage and activities required in livestock operations;  

ii. Business-related actions which include discretionary decision-making;  

iii. Evaluation of the financial condition and needs of the farming operation;  

121 7 C.F.R. § 1497.3(b)(Active Personal Labor) (1990). It also includes similar activities with respect to conservation uses, conserving cover crops, and livestock operations; see also ASCS HANDBOOK, supra note 15, Exhibit 2, at 1 (Sept. 20, 1988) (defining “Active Personal Labor”).  


123 See id. ("Through the use of the word 'personal,' hired labor may not be used to meet this requirement."); see also 7 C.F.R. § 1497.3(b)(Definitions) (1990).  

124 7 C.F.R. § 1497.3(b)(Active Personal Management)(1),(2) (1990); see also ASCS HANDBOOK, supra note 15, Exhibit 2, at 1-2 (Oct. 26, 1988 & Sept. 20, 1988) (defining “Active Personal Management”). The definition of “active personal management" was purposefully made an expansive one. See 53 Fed. Reg. 29,554 (1988) (Prefatory Comments to Definitions) ("This definition also has been changed in the final rule by expanding the activities which meet the definition of 'active personal management' to include activities regarding the management of conservation acres, the marketing and promotion of agricultural commodities and the acquiring of technical information used in the farming operation."). As noted in the text, the qualifying activities may be performed off the farming operation.  

iv. Assistance in the structuring or preparation of financial reports or analyses for the farming operation;

v. Consultations in or structuring of business-related financing arrangements for the farming operation;

vi. Marketing and promotion of agricultural commodities produced by the farming operation;

vii. Acquiring technical information used in the farming operation; or

viii. Any other management function reasonably necessary to conduct the farming operation and for which service the farming operation would ordinarily be charged a fee.\textsuperscript{126}

The activities listed in the definition are not inclusive. Rather, they "are indicative of the type of activities that are considered active personal management."\textsuperscript{127} As noted above, the services may be performed on or off the farming operation. Thus, when the breadth of the qualifying services is coupled with the ability to perform them off the farming operation, there is a great deal of latitude for fulfilling the "active personal management" requirement.

\textit{b. The Quantity Requirements}

As with the "significant contribution" of inputs, a "significant contribution" of "active personal labor" or "active personal management" or a combination of the two must meet a minimum level of activity. In other words, there is a minimum quantity of those services that must be contributed to satisfy the "significant contribution" requirement.

When only "active personal labor" is contributed, the minimum quantity is the smaller of either "1000 hours per calendar year" or "50 percent of the total hours which would be required to conduct a farming operation which is comparable in size to such individual's or entity's commensurate share in the farming operation . . . ."\textsuperscript{128} In other words, the required contribution is the lesser of one-thousand hours or fifty percent of the individual's or entity's commensurate share of the total hours necessary to conduct the farming operation. Both are not required. One-thousand hours "is approximately one half

\textsuperscript{126} 7 C.F.R. § 1497.3(b)(Active Personal Management)(2) (1990).


\textsuperscript{128} 7 C.F.R. § 1497.3(b)(Significant Contribution)(2) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 51, at 45 (Mar. 28, 1989).
of a normal work year."\(^\text{129}\)

When only "active personal management" is contributed, the minimum quantity that must be contributed to satisfy the "significant contribution" requirement is not expressed in terms of hours or a percentage of hours. Rather, the contribution is measured by its significance. Specifically, the contribution must consist of "activities which are critical to the profitability of the farming operation, taking into consideration the individual's or entity's commensurate share in the farming operation . . . ."\(^\text{130}\) As noted in the preceding discussion of the definition of "active personal management," the nature of such critical activities is broad.\(^\text{131}\)

In some instances, the contribution of either "active personal labor" or "active personal management" singly may not be sufficient to satisfy the services side of the "significant contribution" requirement. In those instances, a combined contribution of the two may be used to satisfy the requirement.

However, to satisfy the quantity requirement, the combined contribution must be such that "when viewed together . . . [the contribution of each] results in a critical impact on the profitability of the farming operation in an amount at least equal to the significant contribution of active personal labor or active personal management . . . ."\(^\text{132}\)

The ASCS recognizes that several difficulties may be encountered in measuring contributions of labor and management. The difficulties include measuring contributions of management under the "critical to profitability" standard, the inherent differences in labor needs among different farming operations, and, in some instances, the difficulty in distinguishing between labor and management.\(^\text{133}\) Accordingly, the ASCS has given its county committees "enough discretion to make the subjective decision required."\(^\text{134}\)

The county committees' discretion is guided not only by the regulations, but also by the goal of commodity and other farm


\(^{130}\) 7 C.F.R. § 1497.3(b)(Significant Contribution)(3) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 51B, at 46 (Sept. 20, 1988).

\(^{131}\) See supra notes 124-27 and accompanying text.

\(^{132}\) 7 C.F.R. § 1497.3(b)(Significant Contribution)(4) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 51C2, at 46 (Sept. 20, 1988).

\(^{133}\) See ASCS HANDBOOK, supra note 15, ¶ 51D, at 46 (Sept. 20, 1988).

\(^{134}\) Id. ¶ 51D1.
programs to provide “program benefits to bona fide farmers, personally providing meaningful inputs on the farm.”135 Moreover, to determine whether a combined contribution is sufficient or whether a contribution of one service or the other is adequate, consideration is given to the types of crops produced, the “normal and customary farming practices in the area,” and the “total amount of labor and management . . . necessary for such a farming operation in the area.”136

In summary, the “significant contribution” of services requirement represents the second part of the two-part “significant contribution” requirement. Under the requirement, the services, whether contributed singly or in combination, must meet both definitional and quantity standards.

An important aspect of the definitional criteria is the preclusion of the use of hired labor or management to satisfy the requirement. Labor or management, contributed singly or in combination, must be performed personally.

The quantity requirements are largely governed by subjective standards. Thus, although the standards for assessing the quantity of contributions of “active personal labor” have objective criteria, the standards for assessing the quantity of “active personal management” or a combination of the two services are not solely objective. As a result, discretion to make such decisions has been granted to the ASCS county committees.

E. The Second Element of the “Actively Engaged in Farming” Requirement: The “Commensurate Contribution” Requirement

A second requirement, referred to here as the “commensurate contribution” requirement, must be satisfied to be considered “actively engaged in farming.” Chronologically, the determination of whether the “commensurate contribution” requirement has been satisfied is made after a “person” is determined to have satisfied the “significant contribution” requirement. If the “significant contribution” requirement has been satisfied, additional contributions to the farming opera-

135. Id. ¶ 51D2; see also 53 Fed. Reg. 29,554 (1988) (Prefatory Comments to Definitions) (also discussing the broad nature of the qualifying services).
136. 7 C.F.R. § 1497.6(c) (1990).
tion may be needed to satisfy the “commensurate contribution” requirement.

The “commensurate contribution” requirement essentially requires that the individual’s or entity’s contributions to the farming operation must be commensurate with that individual’s or entity’s claimed, i.e., percentage, share of the profits or losses from the farming operation.\textsuperscript{137}

The ultimate determination of whether the “commensurate contribution” requirement has been satisfied involves a comparison of all of the individual’s or entity’s contributions with the individual’s claimed share of the profits or losses from the farming operation. The equality between the two need not be exact. Rather, the standard is a “within reason” standard.\textsuperscript{138}

The qualifying contributions for the “commensurate contribution” requirement include “significant contributions.” In other words, the contributions used to satisfy the first element of the “actively engaged in farming” requirement may also be used to satisfy the second element of the “actively engaged in farming” requirement.

\textsuperscript{137} See 7 C.F.R. § 1497.6(d)(1) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 52A, at 47 (Sept. 20, 1988).

\textsuperscript{138} ASCS HANDBOOK, supra note 15, ¶ 52C, at 48 (Jan. 18, 1989). When a “person” is participating in both an acreage reduction program (ARP) and the CRP, special rules apply to determine whether the person’s contributions are “commensurate” with that person’s share of the farming operation’s profits or losses. In essence, those rules first require a comparison of the person’s contributions with his or her shares of the program crops and the CRP. If the result does not satisfy the “commensurate” requirement, then the comparison is to include both the ARP and the CRP. For further details, see id. ¶ 52D, at 48.5 (Jan. 19, 1990).

In certain circumstances, the use of a concept known as “blended shares” may be necessary. This may be required when, for example, “a producer has different shares of program crops and land uses, possibly on different farms, within a farming operation . . . .” In such a situation, “it may be necessary to blend the shares to determine the producer’s overall share of the farming operation.” Id. ¶ 53A, at 49 (Aug. 14, 1989). The formula for making blended share determinations is found at id. Exhibit 4.5, at 1-5 (Aug. 14, 1989).

In other instances, a “percent of cropland” determination may have to be made. This determination may be needed because

[t]he producer may only receive the share of payments represented by the percentage of cropland owned, when a producer: [d]oes not provide a significant contribution of active personal labor or active personal management to the entire farming operation [or] [i]s “actively engaged in farming” on a portion of the land because of the landowner provision.

Id. ¶ 53B1, at 49 (Aug. 14, 1989); see also id. ¶ 141C, at 141-42 (Mar. 28, 1989) (discussing the “percent-of-cropland” factor when the producer is both a tenant and landowner in the producer’s farming operation). Instructions for such a determination are found at id. Exhibit 4.5, at 4 (Aug. 14, 1989). Examples of farming operations requiring “percent of cropland” as a payment factor are found at id. Exhibit 10.7, at 1-12 (Mar. 28, 1989).
farming” requirement, the “commensurate contribution” requirement. The qualifying contributions include both the inputs and services contributions that make up the “significant contribution” requirement.

In addition to contributions that meet the requirements for “significant contributions,” some contributions that do not qualify as “significant contributions” may count toward the satisfaction of the “commensurate contribution” requirement. Thus, contributions of the specified inputs and services that are quantitatively or qualitatively insufficient to be considered “significant contributions” may count toward the “commensurate contribution” requirement. The “significant contribution” requirement, of course, must be satisfied before a determination is made whether the “commensurate contribution” requirement has been satisfied. Consequently, these other contributions would be in addition to the contributions used to satisfy the “significant contribution” requirement.

Specifically, the contribution of the inputs of land, capital, or equipment may be counted toward the commensurate contribution requirement if the input or inputs were contributed directly to the farming operation by the individual or entity. Even if a contribution of one of those inputs cannot be a “significant contribution” because it does not meet the applicable quantity requirements, it could still be a “commensurate contribution.”

Importantly, if a contribution fails to satisfy the source requirements relating to financing the “significant contributions” of inputs, the contribution may be a “commensurate contribution” if one condition is met. The sole condition is that the loan must bear the prevailing interest rate and have a repayment schedule that is “normal for the area.”

Contributions of “active personal labor” and “active personal management” also may qualify and count toward the

139. 7 C.F.R. § 1497.3(b)(definitions of Land, Equipment, and Capital); see also 55 Fed. Reg. 1,572 (1990) (interim rules applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.3(b) (definitions of Land, Equipment, and Capital)); ASCS HANDBOOK, supra note 15, ¶ 52B1, at 47 (Sept. 20, 1988) (requiring that the “repayment schedule [be] normal for the area . . . .”). As discussed with respect to the source requirements of “significant contributions” of inputs, a contribution of one or more of those inputs acquired as a result of a loan in one of the prescribed forms would not be a “significant contribution” even if the loan bears the prevailing interest rate. See supra notes 103-16 and accompanying text.
"commensurate contribution" requirement. Such contributions may be in return for a wage or salary except when the labor or management is performed by a member of a joint operation and the member is paid for any part of the contribution.\textsuperscript{140}

In addition to the contribution of the inputs of land, capital, and equipment and the services of "active personal labor" and "active personal management," qualifying contributions counting toward the "commensurate contribution" requirement may include "[a]ny other contribution such as livestock, bees, etc., which is considered by [the county committee] to be pertinent to the farming operation."\textsuperscript{141}

Thus, categorically, "commensurate contributions" may include any of the following:

1. contributions of land, capital, equipment, "active personal labor," and "active personal management" that satisfy the "significant contribution" requirement;

2. contributions of inputs and services under (1) above that do not satisfy the "significant contribution" requirement provided that
   a. for inputs, the input is contributed directly to the farming operation; and
   b. if the acquisition of the input is financed by one of the means that would preclude its being considered to be a "significant contribution," the loan bears the prevailing interest rate and has a repayment schedule that is normal for the area; and
   c. for services, the labor or management is not performed by a member of a joint operation who is paid for any part of the contribution; or

3. any other contribution considered by the ASCS to be "pertinent" to the farming operation.

\textsuperscript{140} ASCS Handbook, supra note 15, ¶ 52B2, at 48 (Jan. 18, 1989). A "joint operation" is a general partnership, joint venture, or similar business organization. 7 C.F.R. § 1497.3(b)(Joint Operation) (1990).

\textsuperscript{141} ASCS Handbook, supra note 15, ¶ 52B3, at 48 (Jan. 18, 1989).
F. The Third Element of the "Actively Engaged in Farming" Requirement: The "At Risk" Requirement

The third and final element of the "actively engaged in farming" requirement is the "at risk" requirement. This element requires all contributions made by the individual or entity to be "at risk." However, neither the statute nor the regulations define the phrase "at risk." Presumably, it is used in its ordinary sense and means that a contribution must be a true economic investment in the farming operation. Such an investment carries with it the potential for personal gain or loss in accordance with the performance of the farming operation.

IV. THE "PERSON" AND "SEPARATE PERSON" REQUIREMENTS

Part III of this article explained and identified the elements of the "actively engaged in farming" requirement. This Part continues the discussion of the limitation of payments to "persons" who are "actively engaged in farming" begun in Part III in two respects. First, it defines "person" and explains that definition. Second, it explains who may be a "separate person" and how that status is acquired. Part IV addresses what each category of "person" must do to be considered "actively engaged in farming."

A. The Basic Definition of "Person"

Before one can acquire the status of a "separate person," one must first be a "person." "Person" and "separate person" are not synonymous. A "separate person" is a "person" who has satisfied requirements apart from meeting the definition of a "person." This section examines only the question of "who may be a 'person.'"

Beginning with the 1989 crop year, a "person" may be any of the following:

1. an individual;
2. a corporation, joint stock company, association, limited partnership, charitable organization, or other similar entity; or
3. a State, political subdivision, or agency thereof.

142. 7 C.F.R. § 1497.6(d)(2) (1990).
143. Id. § 1497.1(a)(1).
144. Agricultural Reconciliation Act of 1987, Pub. L. No. 100-203, § 1303, 101
An individual or a nongovernmental entity may be a "person" even though the individual or entity is participating "in a farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or a participant in a similar entity . . . ." Thus, for individuals and the business organizations identified under (2) and (3) above, their participation in a general partnership, joint venture, or similar entity or their acting as a grantor of a revocable trust does not disqualify them from being considered "persons."  

Although an individual or an entity participating in a farming operation as a partner in a general partnership, or as a participant in a joint venture or similar entity, may be a "person," general partnerships, joint ventures, and similar organizations may not be "persons." Such forms of business organizations are "joint operations."  

In addition to joint operations, marketing cooperatives may


146. For a discussion of the "actively engaged in farming" requirement applicable to an individual's or nongovernmental entity's participation in a general partnership, joint venture, or similar organization, see infra notes 237-66 and accompanying text. For the rules applicable to revocable trusts, see infra notes 222-23 and 286-92 and accompanying text.

147. "Entity" is defined as follows:

An entity is a corporation, joint stock company, association, limited partnership, irrevocable trust, revocable trust, estate, charitable organization, or other similar organization including any such organization participating in the farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or as a participant in a similar organization.

7 C.F.R. § 1497.3(b)(Entity) (1990); see also ASCS HANDBOOK, supra note 15, Exhibit 2, at 2 (Oct. 26, 1988) (defining "Entity").

Note that this definition does not include general partnerships, joint ventures, and similar business organizations for purposes of payment limitations. They are referred to as "joint operations." See 7 C.F.R. § 1497.3(b)(Joint Operation) (1990).

148. See 7 C.F.R. § 1497.3(b)(Entity) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 94A, at 95 (Sept. 20, 1988) ("A joint operation, including general partnerships, joint ventures, and other similar entities, are not considered a 'person' for payment limitation purposes." (emphasis in original)).

149. 7 C.F.R. § 1497.3(b)(Joint Operation) (1990); see also ASCS HANDBOOK, supra note 15, Exhibit 2, at 4 (Mar. 28, 1989) (defining a "joint operation" as a "general partnership, joint venture, or other similar business organization in which [two] or
not be "persons." However, the joint operation exclusion is more commonly encountered and, accordingly, is the more significant of the two categorical exclusions from "person" status.

B. How Does a "Person" Become a "Separate Person?"

Part III of this article introduced the general requirements for being considered a "separate person" by indicating that a "separate person" is a "person" who is "actively engaged in farming." In other words, a "separate person" is a "person" who has fulfilled the "significant contributions" element, the "commensurate contributions" element, and the "at risk" element of the "actively engaged in farming" requirement.

However, this is an overarching, general statement of what it takes to be a "separate person." In its breadth and generality, it is incomplete. There are additional requirements that must be met before some categories or classes of "persons" can become "separate persons."

Individuals and nongovernmental entities must meet three additional requirements before being considered a "separate person." These requirements are in addition to the "actively engaged in farming" requirement discussed in Part III.

Ordinarily, one determines whether the three additional requirements have been met before determining whether the "actively engaged in farming" requirement has been met. The three additional requirements are foundational in nature. Thus, the additional requirements will be referred to as the three "threshold requirements" applicable to individuals and entities throughout this article.

more individuals or entities pool their resources, such as land, labor, capital, and equipment to conduct the operation").


151. There are nonetheless significant similarities between marketing cooperatives and joint operations such as joint ventures. See FARMER COOP. SERV., U.S. DEP'T OF AGRIC., LEGAL PHASES OF FARMERS COOPERATIVES 4 (1976) ("Cooperatives are non-profit enterprises . . . organized for the economic benefit of [their] members as users of the cooperatives' services . . . .").

152. See supra notes 56-58 and 80-142 and accompanying text.
To satisfy the three threshold requirements, each individual and nongovernmental entity must:

i. Have a separate and distinct interest in the land or the crop involved;

ii. Exercise separate responsibility for such interest; and

iii. Maintain funds or accounts separate from that of any other individual or entity for such interest.153

The way in which the three threshold requirements may be satisfied depends on whether the individual or entity is a member of a joint operation.154

Individuals and entities who are not members of joint operations must satisfy the three threshold requirements themselves.155 Thus, for those individuals and entities, the equation for "separate person" status is as follows:

For "separate person" status, individuals and entities who are not members of joint operations must:

A. be a "person" and

i. have a "separate and distinct interest in the land or crop" and

ii. "exercise separate responsibility for such interest" and

iii. "maintain funds or accounts separate from that of any individual or entity for such interest" and

B. be "actively engaged in farming."156

If an individual or entity is a member of a joint operation, the joint operation may satisfy the three threshold requirements for that individual or entity.157 Some of the elements of the "actively engaged in farming" requirement may also be satisfied by the joint operation on behalf of its respective members.158

There are special rules for determining whether charitable organizations can be "separate persons."159 Likewise, special

154. For a definition of joint operation, see supra note 149 and accompanying text.
155. 7 C.F.R. § 1497.3(b)(Person)(2) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 90B, at 89 (Sept. 20, 1988) (defining "Person").
156. 7 C.F.R. § 1497.3(b)(Person)(2) (1990).
157. Id.; see also ASCS HANDBOOK, supra note 15, ¶ 90C, at 90 (Oct. 26, 1988) (defining "Person").
158. For a discussion of "members of a joint operation," see infra at notes 237-66 and accompanying text.
159. Charitable organizations are considered "persons" separate from their members. See 7 C.F.R. § 1497.21 (1990); ASCS HANDBOOK, supra note 15, ¶ 124A, at 126 (June 23, 1989).
rules apply to governmental entities\textsuperscript{160} and member institutions of the Farm Credit System.\textsuperscript{161} A discussion of those rules is beyond the scope of this article. However, the rules applicable for other more commonly encountered “special classes” of individuals and entities are discussed below.

C. “Special Classes” for Purposes of “Separate Person” Status\textsuperscript{162}

There are several categories or classes of individuals and entities that are treated uniquely for purposes of “separate person” status. They include cash rent tenants, husbands and wives, and minor children.

The unique treatment accorded these “special classes” introduces the concept of “combining” “persons” which generally refers to the merging of two “persons” into one “person” for payment-limitations purposes. Thus, instead of two “separate persons,” there is only one “separate person,” assuming the “person” who “survives” the combination is “actively engaged in farming” or otherwise meets the requirements for “separate person” status.

The combination of two “persons” into one does not necessarily mean one of those two “persons” is ineligible for program payments. Eligibility for program payments depends on whether a “person” is “actively engaged in farming.” Thus, even a “person” who is combined into another “person” may still be eligible for program payments if he or she is “actively engaged in farming.”

However, the combination of two “persons” into one always means there is only one payment limit available to the two “persons” who have been combined. Thus, the payments received by the “person” combined into another “person” are subject to the payment limit of that other person. This may have the effect of denying program payments to the “person”

\textsuperscript{160} States and their political subdivisions and agencies are considered to be one “person.” See 7 C.F.R. § 1497.23 (1990); ASCS Handbook, supra note 15, ¶ 128, at 131 (June 23, 1989).


\textsuperscript{162} The “special classes” for purposes of “separate person” status (cash rent tenants, husbands and wives, and minor children), are not to be confused with the “special classes” for purposes of the “actively engaged in farming” requirement. For a discussion of the “special classes” for purposes of the application of the “actively engaged in farming” requirement (landowners, family members, and sharecroppers), see infra notes 297-328 and accompanying text.
who was combined if the "person" representing the combination has already reached the payment limit amount applicable to the payments received.

For example, assume a landlord has five cash rent tenants, none of whom are "separate persons," but all of whom are "actively engaged in farming." In such a situation, all five tenants would be combined into the "person" of the landlord. If the first tenant's deficiency payments totaled $50,000, the payment limit would be reached.

Although the remaining four cash rent tenants would be eligible to receive deficiency payments, they would not receive them because the single payment limit applicable to the landlord would have been reached. This not only hurts the remaining four tenants, but is also detrimental to the landlord since the four remaining tenants would have little incentive to rent the land.

I. Cash-Rent Tenants

Cash-rent tenants fall within a "special class" for purposes of "separate person" status. The rules governing "cash rent tenants" were changed by legislation enacted in 1989. The following text discusses the law as it existed prior to and as a result of that legislation. The changes affect the 1989 and 1990 to 1995 crop years differently.

A "cash-rent tenant" is a tenant who rents the land for cash or on a crop-share basis with the share guaranteed as to the amount of the commodity to be paid in rent.


164. An Act to Clarify the Food Security Act of 1985, Pub. L. No. 101-217, §§ 1-2, 103 Stat. 1857 (1989) (to be codified as amended at 7 U.S.C. § 1308(5)(D)); see also 7 C.F.R. § 719.2(z)(1) (1990). (For purposes of the reconstitution of farms under 7 C.F.R. § 719, a "tenant" is defined as "[a] person usually called a 'cash tenant,' 'fixed-rent tenant,' or 'standing rent tenant' who rents land from another for a fixed amount of cash or a fixed amount of a commodity to be paid as rent . . . ")
paid in rent. In other words, a "share tenant," as that tenancy is broadly defined, is not a "cash-rent tenant." 165

In the typical crop-share lease arrangement, the landlord shares in the risk of nonproduction. 166 The tenant is not a "cash-rent tenant" because the risks of production would obviate a guarantee as to the amount of a commodity to be paid in rent. Thus, if there is any uncertainty over the amount of rent due, payable either in cash or in a share of the commodity produced, and at least part of the uncertainty results from the risks of production, the tenant is not a cash-rent tenant.

Subject to exceptions and a legislative modification which are discussed below, the general rule applicable to cash-rent tenants for the 1989 crop year is even if a cash-rent tenant meets the "actively engaged in farming" requirement, the cash-rent tenant is considered to be the same "person" as that tenant's landlord. Thus, for the 1989 crop year, the general definitions in § 719 are incorporated by reference into § 1497 pursuant to 7 C.F.R. § 1497.3(a) (1990).


165. Broadly defined, a "share tenant" is a tenant "who rents land from another person and pays as rent a share of the crops or proceeds therefrom" without regard to the presence of a stipulated guarantee. 7 C.F.R. § 719.2(z)(2) (1990) (the definitions of § 719 are incorporated by reference into § 1497 pursuant to 7 C.F.R. § 1497.3(a) (1990)); see Looney & Beard, Farm Business Planning: Coordinating Farm Program Payment Rules with Tax Law, 57 UMKC L. Rev. 157, 187 (1989) [hereinafter Farm Business Planning] (discussing the use of the terms describing the various forms of farm tenancies in the payment-limitations rules); see also 55 Fed. Reg. 1,572 (1990) (interim rule to be codified at 7 C.F.R. § 1497.3(sharecropper)) (adding to § 1497, for the first time, a definition of the term "sharecropper" and defining it to mean "[a]n individual who performs work in connection with the production of the crop under the supervision of the operator and who receives a share of such crop in return for the provisions of such labor").

166. "The crop-share lease provides the landowner with a share of the crops as his return for his contribution—primarily land—to the farming operations." Looney, Legal and Economic Considerations in Drafting Arkansas Farm Leases, 35 Ark. L. Rev. 395, 398 (1981) [hereinafter Arkansas Farm Leases].

Under the "landowner" provision of the payment-limitations rules, 7 C.F.R. § 1497.13 (1990), a landowner may be considered "actively engaged in farming," if "the landowner receives rent or income for such use of the land based on the land's production or the operation's operating results." 7 C.F.R. § 1497.13 (1990) (applicable to the 1989 crop year); see 55 Fed. Reg. 1,574 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.13). For a discussion of the "landowner" provision, see infra notes 300-16 and accompanying text.
rule is a cash-rent tenant is not a "separate person" even if the tenant meets the "actively engaged in farming" requirement. Of the two, the landlord is the "person," not the cash-rent tenant.167

The effect of the general rule applicable to 1989 crops is that the cash-rent tenant is eligible to receive program payments derived from the crop if the tenant is "actively engaged in farming."168 However, while both the landlord and the cash-rent tenant participate in the farming operation—the landlord by contributing land and the tenant by farming that land—only a single payment limit is available to the operation.

In other words, even though a cash-rent tenant who is "actively engaged in farming" receives program payments, the program payments received by the tenant and the landlord, if any,169 are subject to one payment limit. For purposes of that limit, the "person" is the landlord.

The combination of the tenant into the "person" of the landlord can have negative consequences in at least two situations. First, if the landlord has already "capped-out" at the payment limit, the cash-rent tenant will not receive any payments. The effect of that result on the cash-rent tenant is obvious. It may also affect the landlord's receipt of rent if the landlord and the tenant contemplated that the funds for the rent would be derived from program payments. Second, if the tenant is a joint operation, all of the members of the joint operation who do not meet one of the exceptions to the general

167. If the cash-rent tenant is a "joint operation," all of the members of the joint operation who do not meet one of the exceptions to the general rule will be combined together into the "one person" of the landlord. See ASCS HANDBOOK, supra note 15, ¶ 96, at 96 (Apr. 12, 1989).

A "landlord" is entitled to program payments only if he or she qualifies in his or her own right as being "actively engaged in farming." However, a landowner "who rents land to a farming operation for cash or a crop share guaranteed as to the amount of the commodity" is not considered to be "actively engaged in farming," 7 C.F.R. § 1497.17 (1990). Thus, to qualify for program payments, a landlord must satisfy the "actively engaged in farming" requirement through other means.

168. If all of any tenant's, "cash-rent" or otherwise, production comes from leased land, the determination of whether the tenant is "actively engaged in farming" is based solely on the tenant's activities with respect to that land. If the tenant's farming operation involves both owned and leased land, it is possible that the tenant may be found to be "actively engaged in farming" on the owned land but not on the leased land. In such a case, the payments received by the tenant are based on the percentage of owned cropland acreage in the farming operation. See ASCS HANDBOOK, supra note 15, ¶ 141, at 141-42 (Mar. 28, 1989).

169. The landlord may not be eligible for program payments. See supra note 167.
rule will be combined into the one "person" of the landlord, thus compounding the loss of program payments.\textsuperscript{170}

The general rule for cash-rent tenants for the 1989 crop year is subject to two exceptions. If a cash-rent tenant satisfies one of the exceptions, the tenant may be considered a "separate person." In other words, if one of the exceptions is satisfied, the cash-rent tenant will \textit{not} be combined with the landlord for payment-limitations purposes.

The exceptions apply where the tenant makes a "significant contribution" to the farming operation of the following services and inputs: (1) active personal labor and capital, land, or equipment; or (2) active personal management and equipment.\textsuperscript{171}

Regarding the second alternative, if the equipment is leased there are several additional requirements. First, if the equipment is leased from the landlord (landowner), "the lease must reflect the fair market value of the equipment leased."\textsuperscript{172} Second, if the equipment is leased by the tenant from the same individual or entity that is providing hired labor to the farming operation, "the contracts for the lease of the equipment and for the hired labor must be two separate contracts which reflect the fair market value of the leased equipment and the hired labor," and "the tenant must exercise complete control over the use of a significant amount of the equipment during

\begin{footnotesize}
\begin{enumerate}
\item[170.] Id.

Apparently, some county and state ASCS offices have failed to require that the contribution of equipment be "significant" under the second alternative, the "significant contribution" of active personal management and equipment. A procedure for granting relief to cash-rent tenants in such cases is specified in Notice PL-38 (Apr. 13, 1990).
\item[172.] 7 C.F.R. § 1497.16(b)(1) (1990) (using the term "Landlord"); see also 55 Fed. Reg. 1,574 (1990) (interim rule to be codified at 7 C.F.R. § 1497.16(a)(2)(i)) (same requirement using the term "Landlord"); ASCS HANDBOOK, supra note 15, ¶ 96A, at 95-96 (Apr. 12, 1989) (same requirement using the term "Landowner").
\end{enumerate}
\end{footnotesize}
the current crop year."  

The purpose underlying the general rule for the 1989 crop year and its exceptions is to prevent circumvention of the payment limits through the subdivision of a farming operation into numerous tenancies. The general rule and its exceptions insure that a cash-rent tenant will have made an investment in the operation that justifies the tenant receiving a payment limit separate from the limit applicable to the landlord.

The combination of the cash-rent tenant and the landlord into one “person” for payment-limitations purposes and its resulting confluence of more than one “person” into a single payment limit has negative consequences for both the tenant and the landlord. However, the landlord is placed at the greater disadvantage.

The landlord’s disadvantageous position results from the fact that only the cash-rent tenant can act to meet the exceptions to the general rule discussed in the preceding section. Because only the tenant can meet the requirements of the exceptions, a landlord lacking the ability to force the tenant to meet one of the exceptions has to suffer the consequences of the combination of “persons” even though the landlord was in no way responsible for the combination.

In recognition of the general rule’s unfair treatment of land-

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173. 7 C.F.R. § 1497.16(b)(2) (1990); see also 55 Fed. Reg. 1,574 (1990) (interim rule to be codified at 7 C.F.R. § 1497.16(a)(2)(ii)).

For example, assume individual C rents cropland from landlord D. Individual C contributes one hundred percent of the active personal management and capital needed for the operation. One hundred percent of the labor is hired. The equipment is leased from the landlord at fair market value. Individual C’s share of the profits or losses from the farming operation are commensurate with individual C’s contributions to the operation and the contributions are at risk.

The result is individual C is considered to be “actively engaged in farming.” Individual C has satisfied the second alternative exception to the general rule applicable to cash-rent tenants for the 1989 crop year. In other words, individual C has made a “significant contribution” of “active personal management” and equipment. The equipment was leased from the landlord at fair market value. In addition, individual C has satisfied the “commensurate contribution” and the “at risk” elements of the “actively engaged in farming” requirement. Thus, individual C is considered a “separate person” and would not be combined with the landlord. See ASCS Handbook, supra note 15, Exhibit 10.6, at 17, Example 2 (Mar. 28, 1989); see also 55 Fed. Reg. 1,566 (1990) (similar example noting that “[t]he equipment may be owned by individual C or it may be leased or rented from another source, including the landlord if leased at a fair market value”).

174. See supra note 65 and accompanying text.
lords who have no control over their cash-rent tenants, recent legislation seeks to correct this inequity for the 1989 crop year.\textsuperscript{175} The legislation also has separate provisions applicable to the 1990 crop year, provisions which have been continued by the 1990 Farm Bill so that they will apply to the 1991 to 1995 crop years.\textsuperscript{176}

Under the legislation, the general rule has been modified for the 1989 crop year to provide that
\begin{quote}
[a]ny cash rent tenant that because of any act or failure to act would not meet the provisions of . . . [either of the two exceptions to the general rule] and would therefore be considered to be the same person as the landlord . . . [under the general rule applicable to pre-1990 crop years] shall not be considered to be the same person if the county committee had previously determined the tenant and the landlord to be separate persons, and the landlord did not consent to or knowingly participate in the tenant’s failure to meet. . . . [either exception to the general rule].\textsuperscript{177}
\end{quote}


For 1989 crops, section 1 of the Act provides, in relevant part:
\begin{quote}
(ii) A tenant that because of any act or failure to act would otherwise be considered the same person as the landlord . . . shall not be considered the same person as the landlord if the Secretary has at any time made a determination, for purposes of this section, regarding the number of persons with respect to the tenant’s operation on such land for the 1989 crop year and the landlord did not consent to or knowingly participate in such act or failure to act.

(iii) Any tenant that would be considered to be the same person as the landlord but for the operation of clause (ii) shall be eligible to receive any payment specified in paragraph (1) or (2) of [7 U.S.C. § 1308] or [16 U.S.C. § 3834] with respect to such land only to the extent that the tenant would be eligible for such payments if the tenant were to be considered the same person as the landlord under the regulations in place immediately prior to the enactment of this subparagraph.
\end{quote}

\textit{Id.}


\textsuperscript{176} See infra note 181 and accompanying text.

\textsuperscript{177} 55 Fed. Reg. 1,574 (1990) (interim rule to be codified at 7 C.F.R. § 1497.16(b)).
The modification of the general rule for the 1989 crop year may relieve the landlord of the consequences of the tenant's failure to satisfy one of the exceptions to the general rule for that crop year.\(^{178}\) Thus, if the tenant was not in compliance for the 1989 crop year, the tenant will lose "separate person" status,\(^{179}\) but a landlord who did not consent to or knowingly participate in the tenant's failure to comply will not be penalized. The landlord will retain "separate person" status, assuming that the landlord meets the requirements for "separate person" status.\(^{180}\)

For the 1990 to 1995 crop years, the rule is as follows:

Any person that conducts a farming operation to produce a crop subject to limitations under [7 U.S.C. § 1308] as a tenant that rents the land for cash (or a crop share guaranteed as to the amount of the commodity to be paid in rent) and that makes a significant contribution of active personal management but not of personal labor shall be ineligible to receive any payment specified in paragraph (1) or (2) ... [of 7 U.S.C. § 1308] or ... [16 U.S.C. § 3834] with respect to such land unless the tenant makes a significant contribution of the equipment used in the farming operation.\(^{181}\)

The rule deletes the language "shall be considered the same person as the landlord" from the current statutory statement of the general rule applicable to cash-rent tenants.\(^{182}\) Instead

\(^{178}\) 55 Fed. Reg. 1,574 (1990) (interim rule to be codified at 7 C.F.R. § 1497.16(c)) provides:

[any cash rent tenant that would be considered to be the same person as the landlord except for the provisions of paragraph (b) [the modification of the general rule for the 1989 crop year] of this section shall be eligible to receive payments with respect to such cash rented land only to the extent that the cash rent tenant would have received such payments if the provisions of paragraph (b) of this section did not apply.]

\(^{179}\) See ASCS HANDBOOK, supra note 15, ¶ 96F2, at 97 (Aug. 28, 1990) ("Any tenant, who was or would have been determined to be [one] "person" with the landowner, because of the provisions this paragraph shall be ineligible to receive any payment in excess of the payment due when previously combined."); see also Notice PL-31, ¶ 3A2, at 2-3 (Jan. 29, 1990) (same).

\(^{180}\) For a discussion of the "actively engaged in farming" and "separate person" requirements applicable to landlords, see infra notes 329-36 and accompanying text.


of combining a cash-rent tenant with the landlord when the cash-rent tenant has not satisfied one of the exceptions to the general rule, the rule for the 1990 to 1995 crop years renders the cash-rent tenant ineligible for annual commodity program payments and CRP rental payments. The landlord is not adversely affected, even if he or she had knowledge that the tenant was out-of-compliance.

To be eligible for payments with respect to cash-rented land, the tenant must satisfy the requirements of one of the two exceptions to the general rule applicable to the 1989 crop year. More specifically, to be eligible, the tenant must make a "significant contribution" of active personal labor and capital, land or equipment, or of active personal management and equipment to the farming operation. If the equipment is leased and the second alternative, active personal management and equipment, is relied upon for eligibility, the same restrictions apply for the 1990 crop year as apply for the corresponding alternative exception to the general rule applicable to the 1989 crop year.

2. Husband and Wife

The statute provides that the regulations promulgated by the Secretary of Agriculture "shall provide that, with respect to any married couple, the husband and wife shall be considered to be one person . . . ." The regulations so provide and have survived a constitutional challenge.

The effect of the combination of a husband and wife is that each or either one of them will be eligible for program pay-

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rule operates to avoid any penalty to the landlord if the tenant is not "actively engaged in farming." See also Cash Rent Tenant Provisions, supra note 175, at 2.

183. 55 Fed. Reg. 1,574 (1990) (interim rule to be codified at 7 C.F.R. § 1497.16(d)).

184. Id. For a discussion of the restrictions applicable to the "significant contribution" of leased equipment, see supra notes 96-99 and accompanying text. Instructions to the ASCS county and state offices on the 1990 crop year rule are found in Notice PL-31, ¶ 3B, at 3 (Jan. 29, 1990).


ments if the "actively engaged in farming" requirement is met by each or either one of them. For example, if the wife has a farming operation in which her husband has no interest, she is eligible for program payments if she is "actively engaged in farming" and meets the threshold requirements applicable to all individuals. Similarly, if they are each engaged in farming operations, each is eligible for program payments if the "actively engaged in farming" and the threshold requirements are met by each of them.

However, in any situation where the general rule applies, the "person" for purposes of the payment limit is the "combined person" of both of them. Thus, even if their farming operation involves the actual participation of both of them or they each have independent operations, only one payment limit is available to them.

The only exception to this rule is where, prior to their marriage, a husband and wife "were separately engaged in unrelated farming operations . . . so long as such operations remains [sic] separate and distinct from any farming operation conducted by the other spouse." In other words, for a husband and wife to be two "separate persons," each of them must have been engaged in unrelated farming operations prior to their marriage. In addition, those operations must have been maintained as unrelated farming operations since their marriage, and must remain separate and distinct.

To avail themselves of the exception, both the husband and the wife must satisfy the "actively engaged in farming" requirement. In addition, as individuals, each of them must have satisfied the three threshold requirements applicable to all individuals before they each can be considered a "separate

188. For a discussion of the "threshold requirements," see supra notes 153-58 and accompanying text.

189. If they are engaged in a joint operation, the rules for "actively engaged in farming" determinations for joint operations would apply. See infra notes 237-66 and accompanying text.


192. For a discussion of the application of the "actively engaged in farming" requirement to individuals, see infra notes 227-36 and accompanying text.
person." If a husband and wife were farming separately prior to their marriage, they will be combined into one "person" if any of the following events occur:

1. A merger of any part of either spouse’s operation with the operation of the other spouse;
2. The establishment or purchase of a joint operation or joint venture by the spouses; or
3. The purchase or acquisition of any interest by both spouses in the same entity having a farming interest.

However, a change in the respective sizes of the spouse’s operations will not alter what otherwise would be a separate status.

The 1990 Farm Bill grants the Secretary of Agriculture the authority to waive the general rule in certain circumstances. Specifically, the bill provides:

[A]t the option of the Secretary, in the case of any married couple consisting of spouses who do not hold, directly or indirectly, a substantial beneficial interest in more than one entity (including the spouses themselves) engaged in farm operations that also receives [sic] farm program payments (as described in paragraphs (1) and (2) [7 U.S.C. §§ 1308(1), (2)]) as separate persons, the spouses may be considered as separate persons if each spouse meets the other requirements established under this section and section 1001A [7 U.S.C. § 1308-1] to be considered to be a separate person.

3. Minor Children

For payment-limitations purposes, the age of majority is

193. See supra notes 153-58 and accompanying text.
194. Husbands and wives farming separately prior to their marriage need to be careful not to inadvertently run afoul of this rule. All aspects of their farming operations must be kept separate. Although married couples may file joint tax returns, they must file two schedules, such as Schedule F. See ASCS HANDBOOK, supra note 15, ¶ 91, at 91 (Oct. 26, 1988).
196. Id. ¶ 91D, at 91.
eighteen.\footnote{198} With limited exception, individuals under eighteen are considered to be the same "person" as each parent or any court-appointed guardian or conservator for that individual.\footnote{199}

If, under the general rule, a child is considered to be one "person" with each parent, the two parents are also considered to be one "person." If the parents are divorced, the minor child is considered to be one "person" with the parent having legal custody, or, if the parents have joint custody, with both.\footnote{200}

The effect of the general rule is that a minor child is not considered a "separate person" for payment-limitations purposes. Although a minor child is eligible for program payments if the minor child is "actively engaged in farming" and meets the threshold requirements applicable to all individuals,\footnote{201} the child will be combined with each or one of the other of his or her parents for purposes of the payment limit.\footnote{202}

For a minor child to qualify as a "separate person" for payment-limitations purposes, the following requirements must be satisfied:

1. The minor must be a producer on a farm; and
2. The parent or court-appointed guardian or conservator for the minor must not have an interest in either of the following:
   a. the farm on which the minor is producer; or
   b. any production from that farm.
3. In addition, one of the following requirements must also be satisfied:

\footnote{198} \textit{7 C.F.R. § 1497.20(c)} (1990). Court proceedings conferring majority status on an individual under age eighteen do not affect majority status for payment-limitations purposes. In addition, the individual must have attained the age of eighteen on or before the "status date" of the current year. \textit{ASCS Handbook, supra} note 15, ¶ 92A1, at 91 (Jan. 19, 1990). For an explanation of "status date," see \textit{infra} notes 343-45 and accompanying text.

\footnote{199} \textit{7 C.F.R. § 1497.20(a)} (1990); \textit{ASCS Handbook, supra} note 15, ¶ 92, at 92-93 (Sept. 20, 1988).

\footnote{200} \textit{See ASCS Handbook, supra} note 15, ¶ 91F, at 91 (Jan. 19, 1990). If a minor child’s parents are married but fall within the exception to the general rule for husbands and wives, it is doubtful the combination of both parents into one "person" extends to overrule the exception to the rule for husbands and wives. However, the \textit{ASCS Handbook} is silent on that issue.

\footnote{201} \textit{See supra} notes 153-58 and accompanying text.

\footnote{202} \textit{See ASCS Handbook, supra} note 15, Exhibit 10.6, at 23, Example 2 (Mar. 28, 1989).
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a. the minor must have established and must maintain a separate household from the minor’s parents, guardian, or conservator, and the minor must
i. personally carry out the farming activities on the minor’s farm and
ii. maintain a separate accounting for that operation; or
b. the minor must “not live in the same household as the minor’s parent,” and
i. the minor must be “represented by a court-appointed guardian or conservator who is responsible for the minor;” and
ii. the minor must be the owner of the farm. A minor child may become a “separate person” only by meeting this exception.

D. “Common Entity Determinations”

Entities, as that term is used for payment-limitations purposes, may be “separate persons.” There are, however, restrictions limiting the ability of certain entities to be a “separate person.” If the restrictions apply, the entity will be combined with another entity or individual for payment-limitations purposes. This combination is referred to as the product of a “common entity determination.” Common entity determinations may be made for:

1. Corporations, limited partnerships, and similar organizations under
   a. the “more than 50% interest” limitation and

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203. See 7 C.F.R. § 1497.20(a),(b) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 92C, at 92 (Sept. 20, 1988).
204. 7 C.F.R. § 1497.3(b) (1990) defines an “entity” as:
A corporation, joint stock company, association, limited partnership, irrevocable trust, revocable trust, estate, charitable organization, or other similar organization including any such organization participating in the farming operation as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or as a participant in a similar organization.
205. To be a “separate person,” an entity must meet the three threshold requirements discussed supra notes 153-58 and accompanying text. In addition, the entity must satisfy the elements of the “actively engaged in farming” requirement applicable to the particular category of entity.
b. the "ownership in two or more entities" limitation;

2. Irrevocable trusts under
   a. the "sole income beneficiary" limitation and
   b. the "two or more trusts with common income beneficiaries" limitation; and

3. Estates under the limitation applicable when the deceased would have been one "person" with an heir.

The following discussion addresses each of these limitations.

1. "Common Entity Determinations" for Corporations, Limited Partnerships, and Similar Organizations

Corporations, limited partnerships, and similar organizations may be "separate persons." However, two limitations restrict the ability of these entities to be "separate persons." The two limitations are referred to in this article as the "more than 50% interest" limitation, and the "ownership in two or more entities" limitation. If the limitations apply, one or more corporations, limited partnerships, and other similar entities may be combined into one "person" for payment-limitations purposes.

Under the "more than 50% interest" limitation, if more than fifty percent of the interest in the entity is owned by an individual or another entity, the entity will not be considered a "separate person" from the individual or entity owning the greater than fifty percent share.

In this context, an individual's ownership interest also includes the interest owned by the individual's spouse, minor children, and trusts for the benefit of those minor children.

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206. To be a "separate person," a corporation, limited partnership, or similar organization must meet the three threshold requirements discussed supra notes 153-58 and accompanying text. In addition, such an entity must be "actively engaged in farming." For a discussion of the application of the "actively engaged in farming" requirement to corporations, limited partnerships, and similar organizations, see infra notes 267-73 and accompanying text.

207. 7 C.F.R. § 1497.9(b) (1990); see ASCS HANDBOOK, supra note 15, ¶ 107-08, at 107-08 (Jan. 19, 1990) (discussing limited partnerships and corporations). The ASCS Handbook addresses a number of technical matters relating to this rule, including how to treat partnerships in which all partners are both limited and general and how to treat corporations having more than one class of stock. It should be consulted for the fine points of the rule.

208. 7 C.F.R. § 1497.9(b) (1990).
Where the ownership share of the individual or other entity is less than fifty percent, the limited partnership, corporation, or similar entity will be considered a "separate person" from an individual partner, shareholder, or member.\textsuperscript{209}

The following example illustrates the application of this limitation:

\textit{Example 2}

Assume corporation GH consists of husband G owning 25\% of the stock of the corporation and wife H owning 30\% of the stock in the corporation. Corporation GH provides all the capital, equipment, and land for the farming operation. Husband G and wife H provide a significant amount of both active personal labor and active personal management.

Corporation GH is "actively engaged in farming" because the corporation has made a "significant contribution" of one or more of the required inputs, and husband G and wife H have provided a "significant contribution" of both active personal labor and active personal management. It is assumed that the "commensurate contribution" and "at risk" requirements are satisfied.

Since husband G and wife H collectively own more than 50\% of the stock of the corporation, husband G, wife H, and corporation GH are considered one person for payment-limitations purposes. Thus, this limitation has precluded the corporation from being a "separate person."\textsuperscript{210}

Under the "ownership in two or more entities" limitation,\textsuperscript{211} "[i]f the same two or more individuals or entities own more than 50 percent of the interest in each of two or more limited partnerships, corporations, or other similar entities engaged in farming, all such limited partnerships, corporations, or other

\textsuperscript{209} Id.

\textsuperscript{210} This example was derived from 55 Fed. Reg. 1565 (1990). The same example may also be found at 53 Fed. Reg. 29,565-66 (1990) and the ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 10, Example 3 (Mar. 28, 1989) (Limited Partnerships, Corporations and Other Similar Entities).

\textsuperscript{211} 7 C.F.R. § 1497.9(c) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 107-08, at 107-10 (Jan. 19, 1990) (Limited Partnerships and Corporations).
similar entities shall be considered to be one person." 212

The following example illustrates this limitation:

Example 3

Assume corporation X has stockholders A, B, C, and D, owning 30%, 20%, 15%, and 35% of its shares, respectively. Corporation Y has stockholders A, B, C, and E, owning 10%, 20%, 25%, and 45%, respectively. Each corporation farms land owned by the corporation. Also assume corporations X and Y are considered to be "actively engaged in farming" under the special "landowner" provision discussed below. 213

Note that stockholders A, B, and C hold more than 50% in each of the two corporations. Accordingly, under the "ownership in two or more entities" limitation, the two corporations are considered one "person" because the same two or more stockholders own more than 50% of the stock in each of two corporations having farming interests. 214

2. "Common Entity Determinations" for Irrevocable Trusts

For payment-limitations purposes, an irrevocable trust is a trust which:

(1) May not be modified or terminated by the grantor;
(2) The grantor does not have any future, contingent or remainder interest in the corpus of the trust; and
(3) Does not provide for the transfer of the corpus of the trust to the remainder beneficiary in less than 20 years from the date the trust is established except in cases where the transfer is contingent upon the remainder beneficiary achieving majority or is contingent upon the death of the grantor or income beneficiary. All other

212. 7 C.F.R. § 1497.9(c) (1990).
213. See infra notes 300-16 and accompanying text. In essence, under the "landowner" provision, a landowner is "considered to be actively engaged in farming...if the landowner receives rent or income for...use of the land based on the land's production or the operation's operating results." 7 C.F.R. § 1497.13 (1990) (applicable to the 1989 crop year); see also 55 Fed. Reg. 1,574 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.13).
214. The example was derived from 55 Fed. Reg. 1,565 (1990). The same example may also be found at 53 Fed. Reg. 29,566 (1988) and the ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 12, Example 6 (Limited Partnerships, Corporations, and Other Similar Entities).
trusts shall be considered to be revocable trust [sic].215

Irrevocable trusts may be “separate persons.”216 However, two limitations, the “sole income beneficiary” limitation and the “two or more trusts with common income beneficiaries”

215. 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.3 (Irrevocable Trust)). Previously, an irrevocable trust was a trust that the grantor could not terminate or modify and that did not revert to the grantor after a specific time period. ASCS HANDBOOK, supra note 15, Example 2, at 4 (Mar. 28, 1989) (defining “Irrevocable Trust”).


There is no express authority in the statute for the change in the definition of “irrevocable trust.” The ASCS offered the following explanation for the change:

Major statutory revisions became effective with respect to the 1989 crops and are also applicable to the 1990 crops. Based upon a review of [the] manner in which producers reorganized their farming operations in 1988, it is apparent that producers are establishing trusts with the primary, if not sole purpose to evade these revisions. Accordingly, this interim rule amends these regulations to provide that if upon the termination of an irrevocable trust, if any of the assets of the trust pass to the grantor at anytime, the trust shall be considered to be a revocable trust.

In addition, several producers have established two or more irrevocable trusts in which the grantor of one trust transfers to a trust an undivided interest in land or equipment and names another party to be the income beneficiary of the trust. A third party is the beneficiary of the trust at the termination of the trust in several years.

Simultaneously, the third party has established a second trust in which an equivalent undivided interest in the same property which was given to the first trust is given to the second trust. The grantor of the first trust is named as the remainder beneficiary of the second trust. Based upon a review of the farming operations which utilize these transactions, it is clear that these trusts were used merely to avoid the statutory maximum payment limitation provisions. The current regulations provide that the grantor and an irrevocable trust may be separate persons, while the grantor and a revocable trust are combined as one person. Thus, in the cited example, the grantor has effectively created a revocable trust but has avoided the effect of having the grantor combined with the trust . . . .


216. To be a “separate person,” an irrevocable trust must meet the three threshold requirements discussed supra notes 153-58 and accompanying text. In addition, the trust must be “actively engaged in farming.” For a discussion of the application of the “actively engaged in farming” requirement to irrevocable trusts, see infra notes 274-85 and accompanying text. See ASCS HANDBOOK, supra note 15, ¶ 110, at 111 (Sept. 20, 1988).
limitation, affect the qualification of irrevocable trusts as “separate persons.”

The “sole income beneficiary” limitation provides that “an irrevocable trust [will] be considered to be a person separate from the individual income beneficiaries of the trust except that an irrevocable trust which has a sole income beneficiary [will] not be considered to be a separate person from such income beneficiary.”

The following example illustrates this limitation:

Example 4

Assume individual G is the 100% income beneficiary of G trust. The trust contributes a significant amount of both equipment and capital to the farming operation. Individual G contributes at least 50% of the operation’s active personal labor. G trust leases all land and hires all management and 50% of the labor. Individual G also has farming interests as an individual.

Assuming the “commensurate contribution” and “at risk” requirements are satisfied, G trust is considered to be “actively engaged in farming.” However, individual G and G trust are considered one “person” for payment-limitations purposes because individual G is the sole income beneficiary of the trust.

The second limitation is the “two or more trusts with common income beneficiaries” limitation. It provides that “[w]here two or more irrevocable trusts have common income beneficiaries (including a spouse and minor children) with more than a 50 percent interest, all such trusts shall be considered to be one person.”

The following example illustrates the second limitation:

217. 7 C.F.R. § 1497.10(b) (1990) (emphasis added); see 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.10(b)); see also ASCS HANDBOOK, supra note 15, ¶ 110, at 111 (Sept. 20, 1988) (“A trust is considered . . . [o]ne ‘person’ with the beneficiary if there is only [one] beneficiary.”).

218. This example was derived from 53 Fed. Reg. 29,566 (1988). The same example may also be found at 55 Fed. Reg. 1,565 (1990) and the ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 13, Example 2 (Mar. 28, 1989) (Irrevocable Trusts).

219. 7 C.F.R. § 1497.10(c) (1990); 55 Fed. Reg. 1,574 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.10(c)).
Example 5

Assume testamentary trust Z has income beneficiaries A, B, and C, each with an equal interest, and testamentary trust Z is the owner and operator of a farming operation. Trust Y has income beneficiaries A, B, and C, each of whom has an equal interest. The corpus of trust Y consists of stocks, bonds, notes receivable, urban real estate, and cropland. The cropland is share leased to a separate individual.

Also assume testamentary trust Z and trust Y are considered to be "actively engaged in farming" under the special "landowner" provision. Under this limitation, the two trusts are considered one "person" for payment-limitations purposes because the same two or more income beneficiaries have more than a 50% interest in two or more irrevocable trusts. A revocable trust may never be a "person" separate from the grantor. In other words, a "grantor [of a revocable trust] and the revocable trust shall be considered to be one person."223

3. "Common Entity Determinations" for Estates

One limitation affects the ability of estates to be considered "separate persons." That limitation applies when the deceased would have been one "person" with an heir.

Specifically, the limitation provides that "[i]f the deceased individual would have been considered to be one person with respect to an heir, the estate shall also be considered to be one

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220. See infra notes 300-16 and accompanying text.
221. This example was derived from 55 Fed. Reg. 1,565 (1988). The example may also be found at 53 Fed. Reg. 29,566 (1988) and ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 13, Example 3 (Mar. 28, 1989) (Irrevocable Trust).
222. For the 1990 crop year, a revocable trust is any trust that is not an irrevocable trust. 55 Fed. Reg. 1,575 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.3(b) (Irrevocable Trust)). For the 1989 crop year, a revocable trust is one that may be terminated or modified by the grantor or that reverts to the grantor after a specific time period. ASCS HANDBOOK, supra note 15, Exhibit 2, at 5 (May 19, 1989). For a discussion of the application of the new definition of an irrevocable trust to trusts established on or after January 1, 1987, see supra note 215.
223. 7 C.F.R. § 1497.11(b) (1990); 55 Fed. Reg. 1,557, 1,574 (1990) (interim rule to be codified at 7 C.F.R. § 1497.10(d) (applicable to the 1990 crop year); see ASCS HANDBOOK, supra note 15, ¶ 110, at 111 (Sept. 20, 1988).
The following is an example of a determination in which this limitation is considered, but found to be inapplicable:

**Example 6**

Assume E estate is created by the death of individual E in a certain year. Individual B is the sole heir of the estate.

Individual B provides a significant amount of active personal management. E estate provides equipment and cash rented land. All labor is hired. Individual B also has individual farming interest. Also assume all contributions are commensurate and are at risk.

For purposes of this example, assume E estate is considered to be "actively engaged in farming." Assume also individual B is considered to be "actively engaged in farming" with respect to his individual farming interests. Although individual B is the sole heir of the estate, individual B and the estate are not considered to be one "person" because, prior to individual E's death, individuals E and B would not have been combined as one "person."

V. APPLICATION OF THE "PERSON" AND "ACTIVELY ENGAGED IN FARMING" REQUIREMENTS

Part III of this article identified and explained the general elements of the "actively engaged in farming" requirement. Briefly, those elements are the "significant contribution" requirement, the "commensurate contribution" requirement, and the "at risk" requirement. This Part will examine the application of those elements to the various categories of individuals and entities who may be "persons" for purposes of payment-limitations law.

Not all of the general elements of the "actively engaged in farming" requirement apply to every category of "person." There are "special classes" of "persons" to whom not all of

224. 7 C.F.R. § 1497.12(b) (1990).

225. For a discussion of the "actively engaged in farming" requirement for estates, see infra notes 293-96 and accompanying text.

226. This example was derived from 55 Fed. Reg. 1,566 (1990). The same example may also be found at 53 Fed. Reg. 29,567 (1988) and ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 15, Example 1 (Mar. 28, 1989) (Estates).
the elements apply. Moreover, even when all of the general elements apply, some "persons" have different options for fulfilling those elements. Finally, some "persons" cannot be "actively engaged in farming" under any circumstances.

The categories for which the application of the "actively engaged in farming" requirement will be examined are:

1. individuals;
2. members of joint operations;
3. corporations, limited partnerships, associations, and other similar entities;
4. irrevocable trusts;
5. revocable trusts; and
6. estates.

In most circumstances, these "persons" are subject to all the general elements of the "actively engaged in farming" requirement.

However, there are circumstances under which the individuals and entities listed above fall within certain "special classes" for purposes of the "actively engaged in farming" requirement. These "special classes" are landowners, family members, and sharecroppers.

This Part also discusses the inability of landlords to be considered "actively engaged in farming." It also examines the "actively engaged in farming" requirement as it applies to users or recipients of custom farming services and Indian tribal ventures.

A. Individuals

There are three basic criteria for satisfying the "actively engaged in farming" requirement by individuals. Essentially, those criteria are the general elements of the "actively engaged in farming" requirement that are the focus of Part III. For an individual to be considered "actively engaged in farming":

i. the individual must independently make a significant contribution to the farming operation of both:
   a. capital, equipment, or land, or some combination of those items; and
   b. active personal labor or active personal management or a combination of the two; and

ii. the individual’s contributions to the farming operation must be commensurate with the individual’s claimed...
share of the profits or losses from the farming operation; and

iii. the individual’s contributions must be at risk.²²⁷

The following examples illustrate the application of the “actively engaged in farming” requirement for individuals.

**Example 7**

Assume individual Z, a producer, rents 1,500 acres of land on a share-rent basis, that is, a portion of the proceeds from the sale of the crop are paid to the landlord as rent. Also assume individual Z exercises separate responsibility for his interests in the land and the crop, and he maintains funds and accounts separate from that of any individual or entity for those interests.

Individual Z owns all of the equipment used in the farming operation, and he contributes “active personal labor” constituting at least 50% of the total hours which would be required to conduct a farming operation comparable in size to his commensurate share in the farming operation. In addition, he contributes 100% of the “active personal management.” For purposes of this example, individual Z’s contributions to the operation are assumed to be “commensurate” with his claimed share of the profits or losses from the farming operation, and the contributions are assumed to be “at risk.”

Individual Z is considered to be “actively engaged in farming.” This result is reached because, first, individual Z, as an individual, is a “person.”²²⁸ To be

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²²⁷. 7 U.S.C. § 1308-1(b)(2)(A) (1988); 7 C.F.R. § 1497.6(d)(2) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 26, at 23 (May 19, 1989). Additionally, to be a “separate person,” an individual must satisfy the three “threshold requirements” applicable to individuals. See supra notes 153-58 and accompanying text.

²²⁸. Thus, individual Z satisfies the requirements of 7 C.F.R. § 1497.3(b)(Person)(1)(i) (1990). See supra notes 143-51 and accompanying text.

Individual Z also meets the requirements of 7 C.F.R. § 1497.3(b)(Person)(2) (1990), referred to in this article as the three “threshold requirements” to achieving “separate person” status. Individual Z has a separate and distinct interest in the land or crop involved, exercises separate responsibility for such interest, and maintains funds or accounts separate from that of any individual or entity for such interest. Accordingly, individual Z is considered a “separate person.” For a discussion of the “threshold requirements,” see supra notes 153-58 and accompanying text.
considered "actively engaged in farming," one must always be a "person."

Second, individual Z has satisfied both subparts of the "significant contribution" requirement. Individual Z has made a "significant contribution" of equipment, one of the required inputs. Individual Z owned the equipment and contributed it directly to the farming operation. Because all of the equipment used in the farming operation was contributed by individual Z, the contribution had a value equal to at least 50% of individual Z's commensurate share of the total rental value of the equipment necessary to conduct the farming operation. Thus, individual Z has satisfied the "left hand side" of the "significant contribution" equation. Stated another way, individual Z has satisfied the first subpart of the "significant contribution" requirement, the "significant contribution" of inputs.

Individual Z has also satisfied the "right hand side" or second subpart of the "significant contribution" equation by contributing 100% of the "active personal management." Individual Z also could have satisfied the "significant contribution" of services side of the equation with his contribution of "active personal labor" alone. This is because a "50% [contribution] of the total hours which would be required to conduct a farming operation which is comparable in size to such individual's . . . commensurate share in the farming operation" is sufficient to be "significant contribution" of "active personal labor." 230

Individual Z has satisfied the "commensurate contribution" requirement because it is assumed his contributions to the farming operation are "commensurate" with his claimed share. 231 In addition, it is assumed individual Z's contributions are "at

229. See 7 C.F.R. § 1497.3(b)(Significant Contribution)(l)(i)(C) (1990). For a discussion of the "quantity" requirement applicable to the "significant contribution" of a single input, see supra note 86 and accompanying text.

230. 7 C.F.R. § 1497.3(b)(Significant Contribution)(2)(ii) (1990). For a discussion of the "quantity" requirements applicable to the "significant contribution" of "active personal labor," see supra notes 128-36 and accompanying text.

231. For the specifics of the "commensurate" contributions element of the "ac-
Accordingly, individual Z has done everything that must be done to be considered "actively engaged in farming."  

Example 8

Assume individual A rents land on a share-rent basis. Individual A contributes a "significant" amount of leased equipment, with the lease payments financed by individual A alone (self-financing). Individual A also contributes a "significant" amount of "active personal management" to the farming operation. Capital is borrowed from another producer participating in the farming operation at the prevailing interest rate. The labor needed for individual A's part of the farming operation is hired. Individual A's share of the profits or losses from the farming operation are "commensurate" with individual A's contributions to the operation, and the contributions are "at risk."

Individual A is considered to be "actively engaged in farming." It is assumed individual A is a "person." Individual A has satisfied both sides of the "significant contribution" requirement through the assumed "significant contribution" of leased equipment, which was self-financed, and the "significant contribution" of "active personal management."

The definition of "capital" and its attendant "source requirements" require that a contribution of capital used to meet the "significant contribution" requirement must be provided from a fund or account separate from that of any individual or entity having a

232. For the specifics of the "at risk" element of the "actively engaged in farming" requirement, see supra notes 137-41 and accompanying text.

234. For a definition of "capital," see text supra accompanying note 84; for a discussion of "source requirements," see supra notes 100-16 and accompanying text.
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direct or indirect interest in the farm. Additionally, the capital, or any of the other two inputs, must not have been acquired as a result of a loan made to, guaranteed, or secured by:

i. The farming operation in which the individual or entity has an interest;

ii. Such individual, entity, or farming operation by the farming operation or any of its members, beneficiaries or related entities; or

iii. Such individual, entity, or farming operation, which was guaranteed or secured by the farming operation or any of its members, beneficiaries, or related entities. 235

Here, however, the fact that the capital is borrowed from a person having an interest in the farming operation has no bearing on the “significant contribution” requirement because the capital was not needed to meet that requirement. The contribution of equipment was sufficient to meet the “inputs” side of the equation. If the leased equipment had been financed by a producer having an interest in the farming operation rather than being self-financed, then the “significant contribution” of inputs would not have been made, and individual A would not have been deemed “actively engaged in farming.” 236

B. Members of Joint Operations

To be considered “actively engaged in farming,” an individual or an entity must satisfy the “actively engaged in farming” requirement irrespective of whether the individual or entity farms alone or as a participant in an operation with others. 237

If an individual or entity farms as a member of a “joint opera-

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235. 7 C.F.R. § 1497.3(b)(Capital)(1)(i)-(iii) (1990). For a discussion of the proscriptions regarding the acquisition of capital, see supra notes 103-16 and accompanying text.


237. 7 U.S.C. § 1308-1(b)(1) (1988). A partnership, joint venture, or other “joint operation” may not be a “person.” Hence, a joint operation is ineligible in its own right to receive program payments. Only the members of the joint operation may qualify. See supra notes 148-49 and accompanying text.
tion,” that is, as a partner in a general partnership or as a member of a joint venture or similar organization, that individual or entity may qualify for “actively engaged in farming” status by meeting either:

1. the basic criteria otherwise generally applicable to individuals or applicable to the category of the entity seeking to qualify, whichever is appropriate;  

or

2. the following requirements:
   i. “Significant Contributions”
      The member of the joint operation must make a significant contribution of both:
      a. capital, equipment, or land or some combination thereof; and
      b. active personal labor or active personal management or a combination of the two;
      or, in the alternative,
      a. if the joint operation separately makes a significant contribution of capital, equipment, or land or some combination thereof; and
      b. requirements (ii) and (iii) below are satisfied, the member will qualify as being “actively engaged in farming” by making a significant contribution of active personal labor or active personal management or a combination of the two; and
   ii. “Commensurate Contributions”
      The member’s contributions of capital, equipment, land, labor, or management must be commensurate with the member’s claimed share of the profits or losses of the joint operation; and
   iii. “At Risk”
      The member’s contributions must be at risk.  

238. In other words, a corporation farming as a partner in a general partnership has the option of being considered “actively engaged in farming” under the criteria generally applicable to corporations. The same holds true for any other entity that falls within one of the specific categories discussed in this part, including individuals who may be “landowners.”

239. See 7 U.S.C. § 1308-1(b)(2)(C) (1988) (general requirements); 7 C.F.R. §§ 1497.6, 1497.8 (1990) (regulations concerning “actively engaged in farming” and
The statute, regulations, and *ASCS Handbook* are neither completely clear nor consistent with respect to the foregoing requirements. The statute states that if the joint operation separately makes a significant contribution of capital, equipment, or land or a combination thereof, an individual member need only make a significant contribution of "active personal labor" or "active personal management" or a combination of the two to be considered "actively engaged in farming."240 The statute further provides that the "commensurate contribution" requirement and the "at risk" requirement must be satisfied by the "entity" (apparently referring to the "joint operation"), not the individual member. 241 In relevant part, the statute reads as follows:

If a general partnership, joint venture, or similar entity (as determined by the Secretary) separately makes a significant contribution (based on the total value of the farming operation involved) of capital, equipment, or land, and the standards provided in clauses (ii) and (iii) of paragraph (A), as applied to the entity, are met by the entity, the partners or members making a significant contribution of personal labor or active personal management shall be considered to be actively engaged in farming with respect to the farming operation involved. 242

The regulations reach the same result by substituting the references to "entity" with the term "joint operation." 243 Under the regulations, a member of a joint operation will be considered "actively engaged in farming" if the following requirements are met:

(i) "Significant Contributions"

*Joint Operation*—The joint operation must make a

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241. Id.
242. Id. Paragraph A provides that, for individuals, the "actively engaged in farming" requirement will be satisfied if, among other things, "(ii) the individual's share of the profits or losses from the farming operation is commensurate with the individual's contributions to the operation; and (iii) the individual's contributions are at risk." Id. § 1308-1(b)(2)(A).
243. 7 C.F.R. § 1497.8(c) (1990). The substitution of "entity" with "joint operation" is necessary because "joint operations," including general partnerships, joint ventures, and similar business organizations, are excluded from the definition of "entity." See id. § 1497.3 (Entity).
separate significant contribution of capital, equipment, or land, or a combination of the three inputs;\textsuperscript{244} and

\textit{Member}—The member must make a significant contribution of active personal labor or active personal management or a combination of the two services.\textsuperscript{245}

(ii) "Commensurate Contributions"

\textit{Joint Operation}—The joint operation must have a "share of the profits or losses from the farming operation which is commensurate with [its] contribution to the operation."\textsuperscript{246}

\textit{Member}—No reference is made to a commensurate contribution requirement by a member.\textsuperscript{247}

(iii) "At Risk"

\textit{Joint Operation}—The joint operation's contributions to the operation must be at risk;\textsuperscript{248}

\textit{Member}—No reference is made to a requirement that contributions by a member need to be at risk.\textsuperscript{249}

However, the \textit{ASCS Handbook} treats the joint operation's significant contribution of capital, equipment, or land or a combination thereof, merely as a substitution for that contribution by the individual member.\textsuperscript{250} In essence, it states that even if the joint operation makes that contribution, the members must still satisfy the "commensurate contribution" and "at risk" re-

\footnotesize{
\textsuperscript{244} \textit{Id.} § 1497.8(c). The individual member may also make its contribution of land, capital, or equipment, \textit{id.} § 1497.8(b)(1), but that contribution would not apply to the other members of the joint operation in meeting their input requirement. \textit{Id.} § 1497.6(b). Only if the joint operation separately makes a significant contribution of the inputs will that element be satisfied for the other members. \textit{Id.} § 1497.8(c) ("joint operation separately makes a significant contribution").

\textsuperscript{245} \textit{Id.} § 1497.8(c).

\textsuperscript{246} \textit{Id.} §§ 1497.8(c), 1497.6(d)(1).

\textsuperscript{247} See \textit{id.} § 1497.8(c). \textit{But see id.} §§ 1497.8(a), 1497.6(d)(1); see also infra text accompanying note 252.

\textsuperscript{248} 7 C.F.R. §§ 1497.8(c), 1497.6(d)(2) (1990).

\textsuperscript{249} See \textit{id.} § 1497.8(c). \textit{But see id.} § 1497.6(d)(2); see also infra text accompanying note 252.

\textsuperscript{250} \textit{ASCS Handbook}, supra note 15, ¶ 27A2, at 23 (May 19, 1989).}
requirements. In doing so, the ASCS Handbook apparently relies on 7 C.F.R. section 1497.6(d)(1) and (2) which state that for an individual or entity to be deemed "actively engaged in farming," the contributions of the individual or entity must be "commensurate" with the individual’s or entity’s claimed share of the profits or losses of the farming operation and must be "at risk."

The discrepancy between a literal reading of the statute and the regulations on one hand, and the ASCS Handbook on the other, leaves room for argument over the "actively engaged in farming" requirement for members of joint operations.

251. See id. ¶ 27A3-4, at 23 (May 19, 1989); see also id. ¶ 94D, at 93 (Sept. 20, 1988) ("If any member does not contribute a commensurate share to the operation, that member is not considered to be ‘actively engaged in farming’ and may not receive any payment from the joint operation.").

252. In relevant part, 7 C.F.R. § 1497.6 (1990) provides:

(b) Actively engaged in farming means, except as otherwise provided in this part, that the individual or entity, independently makes a significant contribution to a farming operation, of:

(1) Capital, equipment, or land, or a combination of capital, equipment, or land; and

(2) Active personal labor or active personal management, or a combination of active personal labor and active personal management.

(d) In order to be considered to be actively engaged in farming an individual or entity specified in § 1497.7 through § 1497.15 must have:

(1) A share of the profits or losses from the farming operation which is commensurate with the individual’s or entity’s contribution to the operation; and

(2) Contributions to the farming operation which are at risk.

See also id. § 1497.8(a) ("Members of a joint operation must furnish satisfactory evidence that their contributions of land, labor, management, equipment, or capital to the joint operation are commensurate with their claimed shares of profits or losses of the joint operation.").

253. The gloss the ASCS Handbook places on 7 U.S.C. § 1308-1(b)(2)(C) (1988) totally avoids a literal reading of that provision. The statute expressly states that the "commensurate contribution" and "at risk" requirements are to be applied to and satisfied by the "entity" (meaning "joint operation" as "entity" is used in the context of the statute). The ASCS Handbook applies neither of those requirements to the joint operation. Although the statute’s express language presents the difficult question of how the joint operation is able to satisfy the "commensurate contribution" and "at risk" requirements when it exists only to pass through to its members the operation’s profits or losses, the ASCS Handbook ignores such questions by ignoring the plain language of the statute.

Prudence and cautious counseling dictate that the approach taken by the ASCS Handbook should be given serious consideration.254

The following examples illustrate the application of the "actively engaged in farming" requirement for members of joint operations:

Example 9

Partnership AB farms 2,000 acres of land. The partnership owns the equipment and the individual partners provide at least 50% of their "commensurate" share of "active personal labor" and a "significant" amount of "active personal management." Each partner's share of the profits or losses from the farming operation are "commensurate" with the partner's contribution to the operation and their contributions are "at risk."

Partner A and partner B are considered to be "actively engaged in farming." As individuals, partners

1(b)(2)(C). Nevertheless, despite the use of identical language in both provisions, the ASCS Handbook does not interpret the language in the same way. For joint operations, the members, not the "entity," must satisfy the "commensurate contribution" and "at risk" requirements. ASCS HANDBOOK, supra note 15, ¶ 27A3-4, at 23 (May 19, 1989). For corporations and similar entities, the "entity" must satisfy those requirements. Id. ¶ 30A3-4, at 25 (Jan. 19, 1989).

For a discussion of the application of the "actively engaged in farming" requirement applicable to corporations, limited partnerships, associations, and other similar entities, see infra notes 267-73 and accompanying text.

For a discussion of the ASCS Handbook different treatment of similar statutory language, see infra notes 297-328.

254. The ASCS Handbook complete statement of the "actively engaged in farming" requirement for members of joint operations is as follows:

In addition to qualifying as "actively engaged in farming" as an individual according to paragraph 26 [the requirements for individuals], members of partnerships, joint ventures, and other similar entities (joint operations) shall be considered to be "actively engaged in farming," if all of the following requirements are met:

1. The member makes a significant contribution of active personal labor or active personal management, or combination thereof, to the farming operation.
2. The member, or the joint operation, makes a significant contribution of capital, equipment, or land, or combination thereof.
3. The member must be able to provide satisfactory evidence that its contributions of land, labor, management, equipment, or capital to the joint operation are commensurate with its claimed share of the profits or losses of the joint operation.
4. The member's contributions to the farming operation are at risk.

ASCS HANDBOOK, supra note 15, ¶ 27A, at 23 (May 19, 1989).
A and B are "persons." In addition, both subparts or "sides" of the "significant contribution" requirement have been satisfied. The contribution of inputs (the "left hand side") of the "significant contribution" requirement is satisfied by the joint operation's contribution of equipment. That equipment was owned by the partnership or "joint operation" and was contributed directly to the farming operation.

The second subpart of the "significant contribution" requirement, the contribution of services, is also met. In this example, the contribution was a combination of "active personal labor" and "active personal management" made by each partner, thus satisfying the requirement for each.

The example assumes the "commensurate contribution" and the "at risk" elements are satisfied by the individual partners. Thus, as discussed above, the example implicitly assumes the "significant contribution" of equipment by the joint operation does not excuse the individual members of the joint operation from meeting those requirements.

Example 10

Partnership CD farms 2,000 acres of land. Each of the individual partners contributes a "significant" amount of both capital and "active personal management" to the farming operation. Labor is hired. Equipment and land are rented from third parties. Each partner's share of the profits or losses from the

255. 7 C.F.R. § 1497.3(b)(Person)(1)(i) (1990). It may also be assumed that the additional requirements for being a "separate person" have been satisfied, specifically, that the individual (a) has a separate and distinct interest in the land or crop involved; (b) exercises separate responsibility for such interest; and (c) maintains funds or accounts separate from that of any individual or entity for such interest. Those requirements may be satisfied by each partner individually or by the partnership. See 7 C.F.R. § 1497.3(b)(Person)(2),(3) (1990).

For a discussion of the additional, or "threshold," requirements that must be satisfied by individuals and nongovernmental entities to be deemed "separate persons," see supra notes 153-58 and accompanying text.

256. 7 C.F.R. § 1497.8(c) (1990).

257. Id.

farming operation is “commensurate” with the partner’s contribution to the operation, and their contributions are “at risk.”

As individuals, C and D are each a “person.” Also, partner C and partner D are considered to be “actively engaged in farming.”

This example differs from the preceding one in that the “significant contribution” of one of the required inputs was made by each partner, not the partnership. Accordingly, each partner has contributed a “significant” amount of one of the required inputs. In this example, that input was capital. Each partner has made a contribution of one of the required services and, in this example, that service was “active personal management.” The contributions were also “commensurate” with their respective shares of profits or losses and were “at risk.”

In this example, the equipment and land were leased from third parties. Equipment and land may be leased from any source. However, if equipment or land is leased from another individual or entity with an interest in the farming operation, the equipment or land must be leased at a fair market value. Because all of the requirements were satisfied, partner C and partner D are each considered to be “actively engaged in farming.”

Example 11

Partnership X consists of three partners who are corporation D, individual A, and partnership BC. Corporation D provides a “significant” amount of the capital to the farming operation and a “significant” amount of “active personal management.” Corporation D finances individual A’s equipment contribution at the prevailing interest rate. Individual A also con-


260. See supra notes 96-99 and accompanying text.

261. This example was derived from 55 Fed. Reg. 1,564 (1990). The example may also be found at 53 Fed. Reg. 29,565 (1988) and ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 7, Example 2 (Mar. 28, 1989) (Joint Operation).
tributes the use of individual A's owned land and a "significant" amount of "active personal labor." Partnership BC contributes most of the equipment used in the farming operation, and partners B and C contribute a "significant" amount of both "active personal labor" and "active personal management."

Assuming each partner's share of partnership X is "commensurate" and "at risk," corporation D, individual A, and partnership members, B and C, are each considered to be "actively engaged in farming." To reach that result, each partner must be a "person." Each partner, with the exception of partnership BC, is a "person." Partnership BC cannot be a "person" because it is a "joint operation."262 However, the individual members of that partnership, B and C, may be "persons."263

The "significant contribution" requirements are met by each partner. Corporation D has satisfied both subparts or "sides" of that requirement by making "significant contributions" of both capital and "active personal management." Partners B and C satisfied the contribution of inputs subpart of the "significant contribution" requirement through the "significant contribution" of equipment by their partnership, BC.264 B and C satisfied the "significant contribution" of services subpart through their individual "significant contributions" of "active personal labor" and "active personal management."

Individual A made "significant contributions" of equipment, owned land, and "active personal labor." Although the contribution of equipment does not count toward the "significant contribution" requirement because it was financed by corporation D,265 the inputs side of the "significant contribution" requirement is satisfied by the "significant contribution" of land. The services side of the equation is satisfied by

262. See supra notes 148-49 and accompanying text.
263. See 7 C.F.R. § 1497.3(b)(Person)(1)(i) (1990). For a discussion of the three "threshold requirements" individuals and nongovernmental entities must satisfy to be deemed "separate persons," see supra notes 153-58 and accompanying text.
264. See 7 C.F.R. § 1497.8(c) (1990).
265. See id. § 1497.3(b)(Equipment)(3).
the "significant contribution" of "active personal labor."^266

C. Corporations, Limited Partnerships, Associations, and Other Similar Entities

The basic criteria a corporation, limited partnership, association, or other similar entity must meet to be considered "actively engaged in farming" are similar to those for individuals, except where the inherent differences between individuals and entities warrant distinctions. The basic criteria are as follows:

1. "Significant Contributions"
   a. The entity must make a separate significant contribution based on the total value of the farming operation, capital, equipment, or land, or a combination of any of those inputs; and
   b. the stockholders or members collectively must
      i. make a significant contribution of active personal labor or active personal management or a combination of the two to the operation, and
      ii. the stockholders or members making that contribution must have at least a fifty percent combined beneficial interest in the entity; and

2. "Commensurate Contributions"
The entity's contributions to the farming operation must be commensurate with the entity's claimed share of the profits or losses from the farming operation; and

3. "At Risk"
The entity's contributions must be at risk.^267

The regulations provide that the "significant contribution" of "active personal labor" or "active personal management" or a combination of the two by the stockholder or member may be compensated or uncompensated.^268 The ASCS Handbook

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266. The example was derived from 55 Fed. Reg. 1,564 (1990). The same example also may be found at 53 Fed. Reg. 29,565 (1988) and ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 8, Example 3 (Mar. 28, 1989) (Joint Operation).
qualifies that requirement by stating if a stockholder or member is compensated, the compensation must be fair and reasonable.⁶⁶⁹

Following are examples of the application of the "actively engaged in farming" requirement for limited partnerships, corporations, and other similar entities:

**Example 12**

Corporation XYZ rents from an individual 3,000 acres of land for a one-fourth share of the crop. Corporation XYZ contributes a "significant" amount of capital to the operation. Stockholders, owning a total of 50% of corporation XYZ, contribute a "significant" amount of "active personal labor." The corporation's contributions to the farming operation are "commensurate" with the corporation's claimed share of the profits or losses from the operation, and the contributions are "at risk."

Corporation XYZ is considered to be "actively engaged in farming." The entity, corporation XYZ, made a "significant contribution" of one of the required inputs, land. The stockholders collectively made a "significant contribution" of one of the required services, "active personal labor." Thus, both subparts of the "significant contribution" requirement were met. In addition, the example assumes that the "commensurate contribution" and "at risk" requirements were satisfied. Neither the "more than 50% interest" nor the "ownership in two or more entities" limitations on a corporation's ability to be a "separate person" apply.⁷⁰ Thus, corporation XYZ is a "separate person" for payment-limitations purposes.⁷¹

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⁷⁰. See supra notes 206-14 and accompanying text. A corporation, like an individual, also must meet the "threshold requirements" to be considered a "separate person." See supra notes 153-58 and accompanying text.

⁷¹. This example was derived from 55 Fed. Reg. 1,564-65 (1990). The example is also found at 53 Fed. Reg. 29,565 (1988) and ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 9, Example 1 (Mar. 28, 1989) (Limited Partnerships, Corporations, and Other Similar Entities).
Example 13

Corporation AB consists of father A and son B, each having a 50% share. Father A is a retired farmer who created the corporation for tax reasons and to aid in the transfer of the farm to son B. The corporation contributes a “significant” amount of capital and equipment to the farming operation. Son B contributes a “significant” amount of both “active personal labor” and “active personal management” to the farming operation. However, most of the labor is provided by hired laborers. Father A lives on the farm and contributes a token amount of “active personal management.”

Because son B has at least a 50% share of the corporation, his “significant contribution” of “active personal labor” and “active personal management,” coupled with the corporation’s “significant contribution” of at least one of the required inputs, is enough to qualify the corporation for “actively engaged in farming” status.272 It is assumed that the corporation’s contributions are “commensurate” with its share of the profits or losses and are “at risk.” Corporation AB is a “separate person” for payment-limitations purposes.273

D. Irrevocable Trusts

Prior to the 1990 crop year, the ASCS defined “irrevocable trust” as a trust that the grantor may not modify or terminate and that does not revert to the grantor after a specified time period.274 Beginning with trusts established after January 1, 1987,275 an “irrevocable trust” is a trust that:

275. The ASCS intends to apply the new definition to trusts established after January 1, 1987. Trusts created prior to that date are governed by the former definition. Notice PL-37, ¶ 3, at 2 (Apr. 9, 1990); but see Notice PL-31, ¶ 4B, at 4 (Jan. 29, 1990) (implying the new definition will apply only to the 1990 crop year).

The 1990 Farm Bill defines irrevocable trusts consistently with the definition
(1) May not be modified or terminated by the grantor;
(2) The grantor does not have any future, contingent or remain-der interest in the corpus of the trust; and
(3) Does not provide for the transfer of the corpus of the trust to the remainder beneficiary in less than 20 years from the date the trust is established except in cases where the transfer is contingent upon the remainder beneficiary achieving majority or is contingent upon the death of the grantor or income beneficiary. All other trusts shall be considered to be revocable trust [sic].

In an irrevocable trust, the income beneficiaries are the ultimate recipients of the farm program payments. Consequently, the income beneficiaries must participate in the satisfaction of the “actively engaged in farming” requirement.

Requiring the income beneficiaries to participate in the “actively engaged in farming” requirement is common to the rules for both the 1989 and 1990 crop years. However, in other respects, the rules for those crop years differ.

For the 1989 crop year, for an irrevocable trust to be considered “actively engaged in farming,” the following requirements must be met:

1. “Significant Contributions”
a. *The trust*—The trust must separately make a “significant contribution” to the farming operation of capital, equipment, or land, or a combination of the three; and

b. *The income beneficiaries*—The income beneficiaries collectively must make a “significant contribution” to the farming operation of “active personal labor” or “active personal management” or a combination of the two; and

2. “Commensurate Contributions”

The trust’s contributions to the farming operation must be commensurate with its share of the profits and losses from the farming operation; and

3. “At Risk”

The trust’s contributions must be at risk.278

The “actively engaged in farming” requirement for the 1990 crop year is the same as the 1989 crop year requirement with two differences. It is reasonable to assume that the requirements for the 1990 crop year will continue for the 1991 to 1995 crop years when new regulations are promulgated under the 1990 Farm Bill.

The first difference, or change in the rules, is “[t]he combined interest of all of the income beneficiaries providing active personal labor or active personal management, or a combination of active personal labor and active personal management, must be at least 50 percent . . . .”279

278. See 7 C.F.R. §§ 1497.10(a), 1497.6(d)(1), (2) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 31, at 26 (Jan. 19, 1989) (“actively engaged in farming” requirement for irrevocable trusts); 53 Fed. Reg. 29,559 (1988) (explaining that the phrase “income beneficiaries” was used to exclude remainder beneficiaries from the requirements of the provision).

279. 55 Fed. Reg. 1,573-74 (1990) (interim rule to be codified at 7 C.F.R. § 1497.10(a)(2)); see also Notice PL-31, ¶4A, at 4 (Jan. 29, 1990) (“For 1990 . . . the combined interest of all of the income beneficiaries providing active personal labor or active personal management, or a combination thereof, must be at least 50 percent.”).

The prefatory comments of the ASCS HANDBOOK contained in the Federal Register announcement of that change state that the applicable regulations, sections 1497.10 and 1497.11, “are revised to provide that the grantor and the beneficiaries of trusts must, if requested, disclose to CCC all interests, whether direct, indirect, or contingent, in any other trust which receives payments or loans from the CCC.” 55 Fed. Reg. 1,559 (1990). However, the amended regulations do not expressly provide for that disclosure. See 55 Fed. Reg. 1,573-74 (1990) (interim rules amending 7 C.F.R. § 1497.10 (1990) and removing and reserving 7 C.F.R. § 1497.11 (1990)).
The ASCS explains the reason for this change as follows:

It has been noted that these payment limitation provisions may be circumvented through the establishment of trusts. For example, individuals that had previously owned corporations that would not qualify as “actively engaged in farming” could set up a trust and name a former employee of the corporation as a beneficiary of the trust and qualify the trust as “actively engaged in farming.” This beneficiary could have a very small interest in the trust which would pay the beneficiary no more than had the beneficiary been an employee of the corporation. Accordingly, § 1497.10 has been amended to provide that the combined interest of the income beneficiaries which provide the active personal labor and/or management to qualify the trust as “actively engaged in farming” must be at least 50 percent. This will not put undue hardship on the majority of trusts, as most trusts are landowners and will be able to qualify as “actively engaged in farming” under the landowner provision found at § 1497.13.280

The second change for the 1990 crop year requires the trust to provide “a tax identification number for the trust to the county committee.”281 As explained by the ASCS, “a separate tax identification number must be provided by each trust before any program payments or benefits are made available to the trust.”282

The following example illustrates the application of the requirements for an irrevocable trust to be considered “actively engaged in farming”:

Example 14

EF trust, with individual E and individual F, each having an interest of 50%, contributes a “significant” amount of capital to the farming operation. Each

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The ASCS explanation for the change references the ability of landowners to qualify for “actively engaged in farming” status. For a discussion of the “landowner provision,” 7 C.F.R. § 1497.13 (1990), see infra notes 300-16 and accompanying text.

281. 55 Fed. Reg. 1,573-74 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.10(a)(3)).

beneficiary contributes a "significant" amount of "active personal management." All labor is hired. The land and equipment are leased. The trust's share of the profits or losses from the farming operation is "commensurate" with the trust's contributions to the operation, and the contributions are "at risk." Individual E also has another farming interest as an individual.

EF trust is considered to be "actively engaged in farming." The inputs side of the "significant contribution" requirement equation is satisfied by the trust's "significant contribution" of capital.283 The services side of that equation is satisfied by the beneficiaries' contribution of "active personal management."284 The trust is a "separate person" for payment limitation purposes. Individual E may also be considered a "separate person" with respect to individual E's individual farming operation.285

E. Revocable Trusts

For the 1989 crop year, the ASCS defines revocable trust as a trust that the grantor may modify or terminate and that reverts to the grantor after a specific time period.286 For the 1990 crop year, a revocable trust is any trust that is not an irrevocable trust.287

For the 1989 crop year, the requirements for a revocable trust to be considered "actively engaged in farming" were set forth in 7 C.F.R. section 1497.11, separately from the requirements for irrevocable trusts which were found at 7 C.F.R. sec-

283. 7 C.F.R. § 1497.10(a)(1) (1990) (requirements for a revocable trust to be considered "actively engaged in farming") (amended by 55 Fed. Reg. 1,573 (1990)).
284. Id. § 1497.10(a)(2) (amended by 55 Fed. Reg. 1,573-74 (1990)).
285. Id. § 1497.10(b) (amended by 55 Fed. Reg. 1,573-74 (1990)). For a discussion of the sole income beneficiary limitation applicable to irrevocable trusts, see supra notes 217-18 and accompanying text.

286. ASCS HANDBOOK, supra note 15, Exhibit 2, at 5 (May 19, 1989) (defining "Revocable Trust").
287. 55 Fed. Reg. 1,573 (1990) (interim rule to be codified at 7 C.F.R. § 1497.10). For the definition of "irrevocable trust" and a discussion of the trusts which are subject to the new definitions of irrevocable and revocable trusts, see supra notes 275-76 and accompanying text.
tion 1497.10. For 1989, a revocable trust must meet the following requirements to be considered "actively engaged in farming":

(i) "Significant Contributions"
   (a) The trust—The trust must separately make a "significant contribution" to the farming operation of capital, equipment, or land, or a combination thereof; and
   (b) The income beneficiaries—The income beneficiaries must collectively make a "significant contribution" to the farming operation of "active personal labor" or "active personal management" or a combination of the two; and

(ii) "Commensurate Contributions"
   The trust's contributions to the farming operation must be commensurate with its share of the profits or losses from the farming operation; and

(iii) "At Risk"
   The trust's contributions must be at risk.\(^{288}\)

For the 1990 crop year, the "actively engaged in farming" requirement for revocable trusts and irrevocable trusts are no longer treated separately. The regulation that previously contained the requirements for irrevocable trusts, 7 C.F.R. section 1497.10, has been renamed "Trusts," and now contains the requirements for both irrevocable and revocable trusts. Section 1497.11 has been removed and reserved.\(^{289}\) Thus, for the 1990 crop year, revocable trusts must meet the same requirements identified in the previous section of this article entitled "Irrevocable Trusts."\(^{290}\) It may be assumed that this regulatory structure will be retained under the regulations for the 1991 to 1995 crop years.

A revocable trust may never be a "separate person" from its grantor. "A revocable trust and the grantor of such revocable trust shall be considered to be one person."\(^{291}\)

\(^{288}\) 7 C.F.R. §§ 1497.11(a)(1),(2), 1497.6(d)(1),(2) (1990); see also ASCS Handbook, supra note 15, ¶ 32, at 26 (Jan. 19, 1989) (setting forth the "actively engaged in farming" requirement for revocable trusts).
\(^{290}\) See supra notes 274-85 and accompanying text.
\(^{291}\) 55 Fed. Reg. 1,574 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.10(d)); see also 7 C.F.R. § 1497.11(b) (1990) ("A grantor and the revocable trust shall be considered to be one person.").
The following is an example of the application of the “actively engaged in farming” requirements to a revocable trust:

**Example 15**

ST trust is a revocable trust having individual S and individual T as beneficiaries. Each beneficiary has a 50% interest. Individual U is the grantor. ST trust contributes a “significant” amount of both capital and equipment to the farming operation. The beneficiaries each contribute a “significant” amount of “active personal management” to the operation. All land is leased and all labor is hired. The trust’s share of the profits or losses from the farming operation is “commensurate” with its contribution to the operation, and the contributions are “at risk.”

ST trust is considered to be “actively engaged in farming.” However, ST trust and individual U are considered one “person” for payment limitation purposes because individual U is the grantor of a revocable trust. 292

**F. Estates**

For two program years after the program year in which an individual dies, the individual’s estate may be considered “actively engaged in farming.” However, once that two year period has passed, 7 C.F.R. section 1497.12(c) limits the ability of the estate to qualify for “actively engaged in farming” status.

Section 1497.12(c) provides that after the two program year period following the program year in which the individual dies, the estate shall not be considered “actively engaged in farming” “unless, on a case by case basis, the Deputy Administrator determines that the estate has not been settled primarily for the purpose of obtaining program payments.” 293

The *ASCS Handbook* interprets this regulatory language to mean that the estate shall not be considered “actively engaged in farming” unless the Deputy Administrator determines, on a case by case basis, “that the estate is still active and is being

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292. This example was derived from 55 Fed. Reg. 1,566 (1990). The example may also be found at 53 Fed. Reg. 29,566 (1988) and ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 14, Example 1 (Mar. 28, 1989) (Revocable Trust).

293. 7 C.F.R. § 1497.12(c) (1990).
kept active for reasons other than for obtaining program payments.”294 Thus, the regulation and the ASCS Handbook are not consistent. Given the obvious intention of section 1497.12, as reflected in a reading of the regulation as a whole, it is likely the quoted language from subsection (c) is an unintended error.

An estate must meet the following requirements to be qualified as “actively engaged in farming” during that two year period:

1. “Significant Contributions”
   a. The Estate—The estate itself must make a “significant contribution” to the farming operation of either capital, equipment, or land, or a combination thereof; and
   b. The Personal Representative or Heirs—The personal representative or heirs of the estate collectively must make a “significant contribution” of either “active personal labor” or “active personal management” or a combination of the two; and

2. “Commensurate Contributions”
   The estate’s contributions to the farming operation must be commensurate with its share of the profits or losses from the farming operation; and

3. “At Risk”
   The estate’s contributions must be at risk.295

For an example of the application of the “actively engaged in farming” requirement for an estate, consider the following:

Example 16

C estate was created in October, 1988, upon the death of individual C. The heirs are individual E, F, and G, each having a one-third interest. Prior to the death of individual C, individual C owned equipment and all of the acreage farmed was cash leased. Individual E will serve as executor for the estate. For 1989, C estate will cash lease land. C estate will contribute a “significant” amount of cash rented land,

295. See 7 C.F.R. §§ 1497.12(a), 1497.6(d)(1),(2) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 34, at 27-28 (Sept. 20, 1988).
owned equipment, and capital for the farming operation. Individual E will provide a "significant" amount of "active personal management" with the estate hiring all labor. All contributions are "commensurate" and are "at risk."

C estate is considered to be "actively engaged in farming." The estate has satisfied the inputs side of the "significant contribution" requirement, and the executor, individual E, has satisfied the services side of the "significant contribution" equation. Satisfaction of the "commensurate contribution" and "at risk" requirements is assumed. The heirs may also be considered "separate persons" with respect to other farming operations if all of the requirements are met for those operations.296

G. "Special Classes" for Purposes of the "Actively Engaged in Farming" Requirement297

By statute,298 there are three "special classes" for purposes of the "actively engaged in farming" requirement. The three special classes are treated differently than the individuals and entities discussed above.

The result of this different treatment is that the three special classes are subject to "relaxed requirements" to be considered "actively engaged in farming."299 The three special classes are landowners, family members, and sharecroppers.

1. Landowners

Landowners are placed in a "special class" for purposes of the "actively engaged in farming" requirement.300 A land-


297. The "special classes" for purposes of the "actively engaged in farming" requirement are not to be confused with the "special classes" for purposes of "separate person" status. For a discussion of "special classes" for purposes of "separate person" status, see supra notes 162-203 and accompanying text.


299. 55 Fed. Reg. 1,560 (1990) ("Generally, these special provisions provide relaxed requirements for determining whether an individual or entity is 'actively engaged in farming.'").

owner, including any "person" with an undivided interest in land, is considered to be "actively engaged in farming" if the following requirements are met:

1. The landowner must make a "significant contribution" of owned land to the farming operation;
2. The landowner must receive rent or income for the operation's use of the land based on the land's production or the operation's operating results (i.e., not cash rent or rent based on a guaranteed share of the crop);
3. The landowner's contribution of owned land to the farming operation must be commensurate with the landowner's share of the profits or losses from the farming operation; and
4. The landowner's contribution must be at risk.

Essentially, the "landowner" provision relaxes the "significant contribution" element of the "actively engaged in farming" requirement. Only satisfaction of the "inputs" side of the "significant contribution" element, accomplished by the "significant contribution" of land, is required. The landowner is not required to make a "significant contribution" of "active personal labor" or "active personal management" or a combination of the two. In other words, the "landowner" provision dispenses with the "services" side of the "significant contribution" equation.

301. The landowner still must be a "person" within the meaning of 7 C.F.R. § 1497.3(b)(Person) (1990) to satisfy both the "person" prong and the "actively engaged in farming" prong of the twofold requirement of 7 U.S.C. § 1308-1(b)(1) (1988). Of course, to be a "separate person," a landowner must satisfy the three "threshold requirements" for that status. For a discussion of the "threshold requirements," see supra at notes 153-58 and accompanying text.

302. 7 C.F.R. § 1497.15 (1990), which was in effect for the 1989 crop year, makes no reference to a "significant contribution" of land. Only a contribution of land is expressly required. However, the ASCS takes the position that the "contribution of a significant amount of owned land under the landowner provision, was inadvertently omitted in the final rule." 55 Fed. Reg. 1,560 (1990); see also ASCS HANDBOOK, supra note 15, ¶ 49, at 41 (Oct. 26, 1988) (For an individual or entity to be considered "actively engaged in farming" the participant must "make a significant contribution" of certain farming inputs.). Accordingly, section 1497.13 has been revised to require the "significant contribution" of land. 55 Fed. Reg. 1,574 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.13).


304. For a detailed discussion of the "significant contribution" element of the "actively engaged in farming" requirement, see supra notes 83-136 and accompanying text.
If a landowner is farming only owned land, the landowner will be considered “actively engaged in farming” for the landowner’s total operation if the requirements of the “landowner” provision are met. If the landowner is farming both owned land and leased land, the “landowner” provision applies only to the operation on the owned land.

Whether the landowner is “actively engaged in farming” on leased land is a separate determination to be made pursuant to rules other than those found in the “landowner” provision. If the landowner is an individual, the “actively engaged in farming” rules for individuals govern the determination for the leased land. If a landowner is determined not to be “actively engaged in farming” on leased land, the landowner is paid only the percentage of the program payments that equate with the percent of owned land in the landowner’s total farming operation.  

A landowner who cash leases land to a farming operation is not a “landowner” for purposes of the “landowner” provision. Under such circumstances, the landowner is considered a “landlord” under the provisions applicable to “landlords” and not a “landowner.”

A landowner who is a “landlord” may not be “actively engaged in farming” unless the landowner (“landlord”) satisfies the “actively engaged in farming” requirement applicable to any other individual or entity who is not a landowner. This is because a landowner who is a “landlord” may not be considered “actively engaged in farming” as the result of a “significant contribution” of land where the landlord receives cash rent, or a crop share guaranteed as to the amount of the commodity to be paid in rent, for such use of land. In such an

305. See ASCS HANDBOOK, supra note 15, ¶ 141, at 141-42 (Mar. 28, 1989). For the definition of “farming operation,” see 7 C.F.R. § 1497.3(b)(Farming Operation) (1990); 55 Fed. Reg. 1,572-73 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.3(b)(Farming Operation)). For examples of farming operation determinations, that is, the determination of whose “farming operation” is whose when there are multiple tracts being farmed by a producer or when the producer is operating on leased or owned land or both, see ASCS HANDBOOK, supra note 15, Exhibit 10.5, at 1-6 (Mar. 28, 1989).

306. For the definition of “cash lease” or “cash rent,” see supra notes 164-66 and accompanying text.


308. For a discussion of “landlords,” see infra notes 329-35 and accompanying text.

arrangement, only the cash-rent tenant is eligible for "actively engaged in farming" consideration. However, the share renting of land does not disqualify a landowner from the benefit of the "landowner" provision.

A member of a joint operation may be a "landowner" in certain circumstances. Specifically, for a member of a joint operation to be a landowner for purposes of the "landowner" provision, the following must be present:

1. the joint operation must hold title to the land in the name of the joint operation; and
2. the joint operation members must submit documentation showing, upon dissolution of the joint operation, title to the land owned by the joint operation will revert to the individual members.

Of the status of "landlords" in the context of the "actively engaged in farming" requirement, see infra notes 329-50 and accompanying text.

Although they may be "actively engaged in farming," cash-rent tenants are limited in their ability to be "separate persons." See supra notes 163-84 and accompanying text.

The "share renting" of land means the landowner "receives rent or income for use of the land based on the land's production or the operation's operating results." ASCS HANDBOOK, supra note 15, ¶ 28A1, at 24 (Apr. 12, 1989). The definition excludes "sharecropping." See 7 C.F.R. § 719.2(z)(Tenant) (1990) (The definitions at 7 C.F.R. § 719 are incorporated by reference by 7 C.F.R. § 1497.3(a) (1990)); see also 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.3(b)(Sharecropper) (1990)) (defining "sharecropper" as "[a]n individual who performs work in connection with the production of the crop under the supervision of the operator and who receives a share of such crop in return for the provisions of such labor").

See ASCS HANDBOOK, supra note 15, ¶ 28, at 24 (Apr. 12, 1989); see also id. Exhibit 10.6, at 2-3, Example 1 (Landowner), Example 4 (Landlord) (Mar. 28, 1989). Furthermore, if both the crop share tenant and the landowner meet the tests for "actively engaged in farming," they should be considered separate persons for payment limitation purposes. . . . The regulations [7 C.F.R. § 1497.16] specify conditions under which a cash rent tenant is considered a separate person from the landlord; so, presumably, a crop share tenant could achieve separate status following those same guidelines. If both the crop share tenant and the landowner meet the actively engaged requirements, separate person status would exist.

Farm Business Planning, supra note 165, at 188 (citations omitted) (discussing at length the ambiguous status of the typical crop share tenant with regard to the "actively engaged in farming" requirement); see also 53 Fed. Reg. 29,565 (1988); ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 6 (Mar. 28, 1989) (Sharecropper). For a discussion of the special class of "sharecropper," see infra notes 323-28 and accompanying text.

It has been observed that this requirement is highly significant in that many partnership agreements provide that upon

Published by Mitchell Hamline Open Access, 1991
Under such circumstances, the "landowner" provision applies to an individual member only to the extent that an undivided interest in the land reverts to the member at the dissolution of the joint operation.\(^{314}\)

The following is an example of the application of the "landowner" provision:

**Example 17**

AB partnership consists of individual A and individual B. AB partnership owns land and rents the land to individual E for one-third of the crop. The general partnership's share of the profits or losses from the farming operation is "commensurate" with the partnership's contribution to the operation, and the contributions are "at risk."

A general partnership is not considered a "person" for payment-limitations purposes.\(^{315}\) Therefore, AB partnership is not "actively engaged in farming" under the "landowner" provision.

However, individuals A and B may be considered "actively engaged in farming" under the "landowner" provision if the terms of the partnership agreement provide that each will have an undivided interest in the land when the partnership is dissolved. If any partner will not receive a share of the land upon dissolution of the partnership, that partner must make a "significant contribution" of either "active personal labor" or "active personal management" or a combination of the two to be considered "actively engaged


\(^{315}\) For a discussion of the inability of "joint operations," including general partnerships, to be "persons," see supra notes 148-49 and accompanying text.
in farming."\textsuperscript{316}

2. \textit{Family Members}

"Family members" are also a "special class" for purposes of the "actively engaged in farming" requirement.\textsuperscript{317} A "family member" is "an individual to whom another member in the farming operation is related as lineal ancestor, lineal descendant, or sibling, including spouses of those family members who do not make a significant contribution to the farming operation themselves."\textsuperscript{318}

An individual who is an adult family member is considered to be "actively engaged in farming" if the following requirements are met:

1. The farming operation must be conducted by "persons," the majority of whom are individuals who are family members;
2. The adult family member must make a "significant contribution" of "active personal labor" or "active personal management" or a combination of the two;
3. The adult family member's contribution of "active personal labor" or "active personal management" or a combination thereof must be commensurate with the member's claimed share (i.e., percentage) of the profits or losses of the farming operation; and
4. The contributions must be at risk.\textsuperscript{319}

In essence, the "family member" provision substitutes for the inputs side of the "significant contribution" requirement equation. That side of the equation is the "significant contribution" of capital, equipment, or land.\textsuperscript{320}

\textsuperscript{316} See 7 C.F.R. § 1497.8(c) (1990). The example was derived from 55 Fed. Reg. 1,562 (1990). The example may also be found at 53 Fed. Reg. 29,563-64 (1988) and ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 1, Example 2 (Mar. 28, 1989) (Landowner).


\textsuperscript{318} 7 C.F.R. § 1497.3(b)(Family Member) (1990). A "family member" is a great grandparent, grandparent, parent, child (including legally adopted children), grandchild, great grandchild, sibling of a family member in the farming operation, and the spouse of a family member, who does not make a "significant contribution" of "active personal labor" or "active personal management" to the farming operation as an individual. ASCS HANDBOOK, supra note 15, ¶ 35B, at 28-29 (Sept. 20, 1988).


\textsuperscript{320} The ASCS Handbook states that the "makeup of the operation at the time the determination is made" is to be considered when making a determination under the
Under the "family member" provision, an adult family member can be considered "actively engaged in farming" by satisfying only the services side of the "significant contributions" element. That side of the equation is satisfied with the "significant contribution" of "active personal labor," "active personal management," or a combination of the two. The "commensurate contributions" and "at risk" elements of the "actively engaged in farming" requirement must also be satisfied. "family member" provision. ASCS HANDBOOK, supra note 15, ¶ 35C, at 29 (Jan. 19, 1989). The ASCS HANDBOOK also offers the following example:

1. In 1988, partnership AB consists of 2 unrelated individual members. In 1989, individual C, an adult son of A, will join the partnership.
   a. Individuals A and B each will provide a significant contribution of active personal labor and active personal management.
   b. Individual C will provide a significant contribution of active personal labor.
   c. The partnership will provide all of the capital and equipment. The land is share leased by the partnership from 5 different landowners.

2. Based on the contributions of each member, individuals A, B, and C are each considered to be "actively engaged in farming", if COC [the county committee] determines the:
   a. Contributions are at risk.
   b. Claimed shares are commensurate with the contributions of each member.

3. In this example, individual C is "actively engaged in farming" because of the family member provision, since the joint operation consists of 3 "persons" a majority of whom are individuals that are family members. The determination that a majority of the "persons" of the joint operation are individuals that are family members shall be made, considering the structure of the joint operation, on the status date.

Id. ¶ 35C, at 29-30. For an explanation of "status date," see infra notes 343-45 and accompanying text.

321. The statutory statement of the "family member" provision, see 7 U.S.C. § 1308-1(b)(3)(B) (1988), bears some similarity to the statutory provisions defining the "actively engaged in farming" requirement for members of joint operations, see id. § 1308-1(b)(2)(C). Specifically, the statutory provision relating to the "actively engaged in farming" requirement for members of joint operations permits the "entity" (joint operation) to make the required "significant contribution" of land, capital, or equipment on behalf of the individual members. That provision also expressly states that the "entity" (joint operation) must satisfy the "commensurate contribution" and "at risk" elements of the requirement.

Similarly, the statutory provision relating to the "actively engaged in farming" requirement for adult family members effectively allows another or others to make the "significant contribution" of land, capital, or equipment. However, the ASCS HANDBOOK does not interpret the literal language of the two statutory provisions in the same way. See supra text accompanying note 250.

On the one hand, the ASCS HANDBOOK ignores the express statutory language in the provision relating to members of joint operations by not imposing the "commensurate contributions" and "at risk" requirements on the "entity" (joint operation) as is expressly required by the statute. On the other hand, the ASCS HANDBOOK follows a literal reading of the statutory provision relating to adult family members. The same similarities in statutory language and the differences in the ASCS HANDBOOK treatment
The following is an example of the application of the "family member" provision:

Example 17

ABC partnership is a family held partnership consisting of father A, son B, and daughter C. In 1989, father A brings son-in-law D into the farming operation. Daughter C, who is married to son-in-law D, does not provide a "significant" amount of "active personal labor" or "active personal management" to the farming operation. Son B contributes a "significant" amount of capital, "active personal labor," and "active personal management." Father A originally contributed his owned equipment to the partnership and contributes some capital and a "significant" amount of "active personal management." Son-in-law D contributes a "significant" amount of both "active personal labor" and "active personal management" to the farming operation.

Father A, son B, and son-in-law D are each considered to be "actively engaged in farming," assuming their contributions satisfy the "commensurate contribution" and "at risk" requirements. Daughter C is not "actively engaged in farming." Son-in-law D was brought into the farming operation using the "family member" provision. If daughter C made a "significant contribution" of "active personal labor" or "active personal management," then son-in-law D would not have been "actively engaged in farming" with respect to the "family member" provision. This is because son-in-law D, as the spouse of daughter C, can only be a "family member" if his spouse, daughter C, does not make a "significant contribution" of "active personal labor" or "active personal management." 322

322. This example was derived from 55 Fed. Reg. 1,567 (1990). The example also may be found at 55 Fed. Reg. 29,568 (1988) and ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 20, Example 4 (Mar. 28, 1989) (Family Member).
3. Sharecroppers

Sharecroppers are the third "special class" established by the statute for purposes of the "actively engaged in farming" requirement.\textsuperscript{323} For the 1989 crop year, the ASCS defined a "sharecropper" as an "individual who performs work in connection with the production of a crop under the supervision of the operator and who receives a share of the crop for labor."\textsuperscript{324} For the 1990 crop year, a sharecropper is "[a]n individual who performs work in connection with the production of the crop under the supervision of the operator and who receives a share of [the] crop in return for the provisions of such labor."\textsuperscript{325}

A sharecropper is considered to be "actively engaged in farming" if the following requirements are met:

1. The sharecropper must make a "significant contribution" of "active personal labor" to the farming operation from which the sharecropper receives a share of the crop;
2. The sharecropper's contribution of active personal labor to the farming operation must be commensurate with his share of the profits or losses from the farming operation; and
3. The contribution must be at risk.\textsuperscript{326}

The following is an example of the application of the "sharecropper" provision:

\textit{Example 18}

Individual Y provides labor for landowner Z on 500

\textsuperscript{324} ASCS HANDBOOK, supra note 15, Exhibit 2, at 6 (Jan. 18, 1989) (defining "Sharecropper"); see also 7 C.F.R. § 719.2(x) (1990) (Sharecropper) (The definitions in § 719 are incorporated by reference in § 1497 pursuant to 7 C.F.R. § 1497.3(a) (1990).); Farm Business Planning, supra note 166, at 186-88 (discussing the "sharecropper" provision); Arkansas Farm Leases, supra note 165, at 418-20 (discussing the definition of "sharecropper" in other contexts).

\textsuperscript{325} 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.3(b)(Sharecropper)).
\textsuperscript{326} 7 U.S.C. § 1308-1(b)(3)(C) (1988); 7 C.F.R. §§ 1497.15, 1497.6 (1990); see also ASCS HANDBOOK, supra note 15, ¶ 29, at 24.5 (Jan. 19, 1990) (setting forth the requirements under the "sharecropper" provision).
acres of rice in exchange for a share of the crop. Individual Y only contributes “active personal labor” to the farming operation. Landowner Z provides individual Y with housing. Individual Y also receives a cash advance that will be set off from the proceeds of the crop after harvest. It is assumed individuals Y and Z's contributions are “commensurate” with their respective shares of the operation’s profits or losses and are “at risk.”

Individual Y is considered to be “actively engaged in farming” since individual Y is a sharecropper, notwithstanding the receipt of a cash advance.\(^{327}\) Landowner Z is “actively engaged in farming” because Z is a landowner within the meaning of the “landowner” provision.\(^{328}\)

H. “Persons” Who May Not Be Considered To Be “Actively Engaged In Farming”: “Landlords”

By statute, certain persons may not be “actively engaged in farming.” The statute specifies that “landlords” are not to be considered “actively engaged in farming” and gives the Secretary authority to designate other persons or classes of persons as not being “actively engaged in farming.”\(^{329}\)

The statute provides that “[a] landlord contributing land to the farming operation if the landlord receives cash rent, or a crop share guaranteed as to the amount of the commodity to be paid in rent, for such use of the land” is not to be considered “actively engaged in farming” with respect to a farm operation.\(^{330}\)

Unlike a “landlord,” a “landowner”\(^{331}\) may be considered

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327. See supra note 324.
328. This example was derived from 55 Fed. Reg. 1,564 (1990). The example is also found at 55 Fed. Reg. 29,565 (1988) and ASCS HANDBOOK, supra note 15, Exhibit 10.6, at 6 (Mar. 28, 1989) (Sharecropper).

For a discussion of the “landowner” provision, see supra notes 300-16 and accompanying text.
330. Id.; see also 7 C.F.R. § 1497.17 (1990) (“An individual or entity who does not meet any of the provisions of § 1497.7 through 1497.15 and a landowner who rents land to a farming operation for cash or a crop share guaranteed as to the amount of the commodity shall not be considered to be actively engaged in farming.”).
331. For an explanation of the “actively engaged in farming” requirement for landowners, see supra notes 300-16 and accompanying text.
"actively engaged in farming." At least two attributes distinguish a "landlord" from a "landowner." First, to be a "landowner," an individual or entity must contribute owned land to the farming operation from which the program payments are to be derived. As illustrated in Example 19 below, a lessee who subleases the land that is then contributed to the farming operation is a "landlord," not a "landowner."

Second, to qualify as a "landowner," the individual or entity must receive "rent or income for [the operation's] use of the land based on the land's production or the operation's operating results." Thus, as also illustrated in Example 19, the receipt of cash rent or a guaranteed crop share makes an individual or entity a "landlord" rather than a "landowner."

Finally, in addition to illustrating the differences between a "landowner" and a "landlord," Example 19 also applies the rule followed by the ASCS in determining whether, under any circumstances, a "landlord" may be "actively engaged in farming." Under the rule, the ASCS treats landlords who do not qualify as "landowners" under the "landowner" provision in the same manner as any other individual or entity who is not a landlord.

Thus, to be considered "actively engaged in farming," a "landlord" must satisfy both parts or "sides" of the "significant contribution" requirement, the contributions must be "commensurate" with the landlord's share of the operation's profits or losses, and the contributions must be "at risk." In that regard, "if the landlord provides leased or rented land to an operation in return for a share of the crop, the land will be considered as a contribution."

Example 19

Landowner A cash leases land to individual B. Individual B subleases the land to operator C. As a result of the sublease, individual B has contributed land to the farming operation. However, individual B does not make "significant contributions" of "active personal labor" or "active personal management" to the farming operation.

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Individual B cannot be "actively engaged in farming." Individual B does not qualify as a "landowner" under the "landowner" provision because individual B has not satisfied the requirement of contributing owned land to the farming operation.\textsuperscript{334} Instead, individual B contributed leased land. Individual B is a "landlord" for payment-limitations purposes.

Thus, unless individual B meets the same requirements for "actively engaged in farming" consideration as generally apply to other individuals, individual B cannot be a "separate person." Here, individual B did not meet those requirements because individual B did not make a "significant contribution" of either the required inputs or services.

Landowner A does not qualify as a "landowner" under the "landowner" provision for this particular farming operation because landowner A did not meet the requirement under that provision. Specifically, landowner A did not receive "rent or income for [the operation's] use of the land based on the land's production or the operation's operating results."\textsuperscript{335}

\section{I. Users or Recipients of Custom Farming Services}

Persons who use or receive custom farming services are not governed by any special provisions. Instead, they must satisfy the "person" and "actively engaged in farming" requirements as any other individual or entity.\textsuperscript{336}

\section{J. Indian Tribal Ventures}

"Individual American Indians are each considered a 'person' for payment limitation purposes under the same provisions as for any other individual."\textsuperscript{337} However, special rules apply

\begin{itemize}
\item \textsuperscript{334} See 7 C.F.R. § 1497.13 (1990); 55 Fed. Reg. 1,574 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.13).
\item \textsuperscript{337} ASCS Handbook, supra note 15, ¶ 95, at 94 (June 23, 1989). For a discussion of the general requirements for being considered a "person," see supra notes 143-51
\end{itemize}
when Indian tribes conduct, as a tribal venture, farming operations on lands owned or held in trust by the tribal venture.

The special rules concern the amount of payments that may be made to the tribal venture, and do not concern the "actively engaged in farming" requirement. Individual members of the tribe are considered to be "actively engaged in farming" under the "landowner" provision.338

Under the special rules, payments may be made in excess of the applicable payment limits with respect to the land owned or held in trust by the tribe. Excess payments may not be made respecting land that is rented or "otherwise acquired."339

However, the excess payments may only be made "if a responsible official of the Bureau of Indian Affairs (BIA) or the Indian tribal council certifies that no payment in excess of such limitation will accrue directly or indirectly to any individual Indian, including the individual's spouse and minor children."340

In addition:

Individual American Indians which [sic] receive payments through an Indian tribal venture as well as under the provisions found in §§ 1497.6 to 1497.15 are required to certify that they will not accrue total payments, including payments made to the Indian tribal venture and to the individual American Indian, in excess of the applicable payment limitation for programs specified in § 1497.1.341

and accompanying text; see also ASCS HANDBOOK, supra note 15, ¶ 95D, at 94 (June 23, 1989) ("Determinations for farming interests of corporations properly chartered under applicable State laws, bona fide trusts (revocable and irrevocable), and estates having American Indians as members are subject to the same provisions as all other corporations, trusts, and estates.").

338. ASCS HANDBOOK, supra note 15, ¶ 95A2, at 94 (June 23, 1989); see supra notes 300-16 and accompanying text for a discussion of the "landowner" provision.


340. Id.; see also ASCS HANDBOOK, supra note 15, ¶ 95A3, at 94 (June 23, 1989) ("Earnings attributable to each individual Indian . . . are considered as earned by the individual. Any individual may only select 2 entities as 'permitted entities' under the 'permitted entity' rule, if applicable."). For a discussion of the "permitted entity" rule, see infra notes 351-91 and accompanying text.

341. 55 Fed. Reg. 1,575 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.22); see also ASCS HANDBOOK, supra note 15, ¶ 95C, at 94 (June 23, 1989) ("An American Indian earning payments as an individual, as well as having payments attributable as a member of a tribal venture, must certify that total payments accrued will not exceed the applicable payment limitation for the individual.").
K. Miscellaneous Matters Relating to the Limitation of Payments to "Persons" Who Are "Actively Engaged in Farming"

1. Where Two or More Provisions Apply

In some circumstances, two or more provisions relating to an individual's or entity's status may appear to be applicable. In all instances where two or more rules in 7 C.F.R. § 1497 appear to apply, the most restrictive governs.342

2. Timing for Determining the Status of "Persons": The "Status Date"

The determination of whether an individual or entity is a "person" who is "actively engaged in farming" is "year specific" and is based on the circumstances existing on a date known as the "status date."343 Generally, that date is April first of the current year, although the ASCS may designate a different "status date."344

Two rules apply to actions taken with respect to a farming operation after the "status date." Under the first rule, actions taken by an individual or entity after the "status date," "but on or before the final harvest date of the last program crop in the area," will not be used to increase the number of persons for that year. Under the second rule, actions taken during that period will be used to determine if there has been a decrease in the number of persons for the current year.345

3. ASCS Procedures for Making Payment-Limitations Determinations

The ASCS Handbook contains detailed instructions to the county and state committees for making payment-limitations determinations. Although beyond the scope of this article, the procedures specify, among other matters, the time periods

342. 7 C.F.R. § 1497.1(f) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 6, at 3 (Sept. 20, 1988) ("If two or more rules appear to be applicable, the rule that is most restrictive on the number of 'persons' shall apply.").

343. ASCS HANDBOOK, supra note 15, ¶ 198E, at 202 (Apr. 10, 1990) ("All 'person' determinations are 'year specific' and must be based on conditions that exist on the status date of the year . . . .").

344. 7 C.F.R. § 1497.4(a) (1990). The "status date" for 1989, for example, was April 14, 1989. ASCS HANDBOOK, supra note 15, Exhibit 2, at 6 (Jan. 18, 1989) (defining "Status Date").

345. 7 C.F.R. § 1497.4(b) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 7, at 4 (May 19, 1989).
for making determinations,\textsuperscript{346} the making of "default determinations,"\textsuperscript{347} "end-of-year reviews,"\textsuperscript{348} and monitoring determinations.\textsuperscript{349}

With respect to these determinations, the 1990 Farm Bill requires that "[t]he State office of the Agricultural Stabilization and Conservation Service shall make the initial determination concerning the application of payment limitations and restrictions established under sections 1001 through 1001C [7 U.S.C. §§ 1308 to 1308-3] to farm operations consisting of more than 5 persons, subject to review by the Secretary."\textsuperscript{350} This new requirement suggests that the determinations for operations consisting of more than five persons will receive greater scrutiny during the 1991 to 1995 crop years.

\textsuperscript{346} Initial determinations are to be made within 60 days of a producer's filing of all of the applicable CCC-502 Forms and all supporting documentation. 7 C.F.R. § 1497.2(e) (1990); ASCS HANDBOOK, supra note 15, ¶ 212, at 213-30 (Apr. 10, 1990). Form CCC-502A is entitled "Farm Operating Plan for Payment Limitation Review for an Individual" (reproduced at id. Exhibit 15 (Aug. 14, 1989)). Form CCC-502B is entitled "Farm Operating Plan for Payment Limitation Review for a Joint Operation" (reproduced at id. Exhibit 16). Form CCC-502C is entitled "Farm Operating Plan for Payment Limitation Review for Corporations, Limited Partnerships and Other Similar Entities" (reproduced at id. Exhibit 17). Form CCC-502D is entitled "Farm Operating Plan for Payment Limitation Review for Estates and Trusts" (reproduced at id. Exhibit 18). Form CCC-502L is entitled "Farm Operating Plan for Payment Limitation Review for an Individual Landowner" (reproduced at id. Exhibit 18.4 (Jan. 19, 1990)).

The filing requirements for Forms CCC-502 are found at id. ¶ 198, at 201-202.5. The supplementary documentation requirements are found at id. ¶ 200, at 203-05 (Jan. 19, 1990); see also 7 C.F.R. § 1497.2(g) (1990) ("Data furnished by the producers will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, without it program benefits will not be provided.").

\textsuperscript{347} If the county committee cannot make an initial determination within the sixty-day period, the producer will receive a "default determination." ASCS HANDBOOK, supra note 15, ¶ 213, at 214.5 (Jan. 19, 1989); see also 7 C.F.R. § 1497.2(e) (1990) which provides:

If the determination is not made within 60 days, the producer will receive a determination for that program year which reflects the determination sought by the producer unless the Deputy Administrator determines that the producer did not follow the farm operating plan which was presented to the county committee for such year.


\textsuperscript{349} Id. ¶ 226, at 229 (Apr. 10, 1990).

VI. PREVENTING THE CREATION OF ENTITIES TO QUALIFY AS "SEPARATE PERSONS"

In addition to linking the "person" requirement with the "actively engaged in farming" requirement for the limitation of payments to persons who are actively engaged in farming, the Farm Program Payments Integrity Act of 1987 also contained provisions designed to prevent the creation of entities for the purpose of qualifying those entities as "separate persons." As a "separate person," any entity so created would be eligible for its own program payments and payment limits. Consequently, the owners of the entity could receive a share of those payments, perhaps in addition to the payments they were receiving as "separate persons" in their own right.

As with the strengthening of the "actively engaged in farming" requirement, the impetus for the provisions preventing the creation of entities to qualify as "separate persons" were the abuses of the then-existing rules documented by the GAO. The essence of those abuses was the manipulation of the payment-limitations rules to increase the number of payments received by what was essentially a single farming operation.

One of the rules subject to abuse was the then-existing rule that allowed two or more individuals to create one or more corporations qualifying for "separate person" status so long as those individuals did not own more than fifty percent of the stock in the newly created corporation.351 That rule allowed producers to substantially increase the number of payment limits applicable to the farming operation.352

To stem such abuses, the current payment-limitations rules addressing the use of entities to create additional "separate persons" limit the number of entities qualifying as "separate persons" in which a person may hold a "beneficial interest." The stated design of the rules is as follows:

[The rules are] designed to accomplish the same result as attributing payments to the persons owning the entity, yet retain the legal concept of the corporation as separate and distinct for its stockholders and provide sufficient flexibility to account for business organizations established for sound planning or business reasons. [They allow] ... legitimate operations to be organized to a level so that many will be

352. BASIC CHANGES, supra note 63, at 21-22, 27.
able to receive benefits on a majority of their production. This will permit operations to participate in the Federal farm programs and still be of sufficient size to be economically feasible. [The provisions] ... will, however, prevent the excessive payments which have occurred in the past.\textsuperscript{355}

The following discussion will examine the specifics of those provisions.

A. The Basic Rules Preventing the Creation of Entities to Qualify as “Separate Persons”

As noted above, an individual or entity qualified as a “separate person” is entitled to receive program payments in his, her or its own right. If that “separate person” is an entity, the owners or members of the entity are usually entitled to share in the payments to the entity, thus multiplying the number of payments received by those owners.

Two basic rules are designed to prevent the creation of entities to qualify as “separate persons.” The basic rules, coupled with ancillary rules relating to the designation of “permitted entities,” limit the eligibility of each “person” having a “substantial beneficial interest” in the entity to receive payments from the entity.

Two basic rules address the eligibility of the owners or members of an entity to receive payments. Those rules are as follows:

1. A person . . . that receives farm program payments . . . may not also hold, directly or indirectly, substantial beneficial interests in more than two entities . . . engaged in farm operations that also receive such payments as separate persons . . . [and]

2. A person that does not receive such payments for a crop year may not hold, directly or indirectly, substantial beneficial interests in more than three entities that receive such payments as separate persons . . . \textsuperscript{354}

For purposes of these two rules, the reference to “person” incorporates the definition of that word in the statute and regulations.\textsuperscript{355} The same is true for the word “entities.”\textsuperscript{356}

The reference to farm program payments incorporates the

\textsuperscript{353} House Report, supra note 61, at 15-16.


\textsuperscript{355} See Agricultural Reconciliation Act of 1987, Pub. L. No. 100-203, § 1303, 101
payments subject to the payment limitations of 7 U.S.C. §§ 1308(1) and (2). This means that the "selection of 'permitted entities' [requires] the selection of one set of 'permitted entities' for all programs found at § 1497.1," and does not allow "a selection of different permitted entities for each program found at § 1497.1."357

As a threshold matter, operation of the two basic rules is triggered when an individual has a "substantial beneficial interest" in one or more entities. For purposes of the two basic rules and the related notification requirements discussed below, for the 1989 and 1990 crop years, a "substantial beneficial interest" in an entity "is an interest of 10 percent or more."358 For the 1991 to 1995 crop years, that percentage will be from "0 to 10%" or more.359

The determination of a "substantial beneficial interest" is made on the basis of all of an individual's or entity's direct or indirect interests in the entity, including ownership of an entity through an interest in a corporation that owns the entity.360 In addition, for the 1989 and 1990 crop years, an interest of less than ten percent may be a "substantial beneficial interest" if an individual or entity has a direct or indirect interest of less than ten percent in more than one entity receiving program payments and the ASCS county committee "determines that the arrangement had been established for the purpose of circumventing the 'permitted entity' provisions of the program."361


358. 7 C.F.R. § 1497.3(b)(Substantial Beneficial Interest) (1990); see also 7 U.S.C. § 1308-1(a)(2) (1988) (specifying the requirements for a "Substantial Beneficial Interest").


361. ASCS HANDBOOK, supra note 15, ¶ 77B, at 74 (Jan. 19, 1990); see also 53 Fed. Reg. 29,557 (1988) which states in the prefatory comments:

   It has been determined that adequate safeguards have been taken to ensure that programs are not abused because of the 10 percent ownership threshold. In addition, if it is determined that a person has attempted to avoid the provisions of Part 1497 by organizing a farming operation through a series of entities in which a person has less than a 10 percent ownership interest,
Under the two basic rules, the limits on the receipt of payments passed through the entity to each “person” having a “substantial beneficial interest” in one or more entities that receive payments in their own right is determined by whether the person is receiving, in that person’s own right, farm program payments subject to a payment limit for that particular year. If the person will receive or is receiving payments in that person’s own right, the entities that also receive payments in which the person has a “substantial beneficial interest” is limited to two.

If the person will not receive or is not receiving payments, the limit is increased to three. This means, in the former situation, an individual may not receive additional payments from more than two entities, and, in the latter situation, an individual may not receive payments from more than three entities in which the individual holds a “substantial beneficial interest.”

Stated another way, an individual who receives program payments “subject to limitation may not receive additional payments, directly or indirectly, from holding substantial beneficial interest in more than 2 entities that also receive payments.” If an individual is not receiving payments as an individual, that individual “may not receive additional payments, directly or indirectly, from holding substantial beneficial interests in more than 3 entities that receive payments.”

B. The Ancillary Rules: The Designation of “Permitted Entities”

There are basic rules limiting the receipt of payments by persons from entities in which they hold beneficial interests. Coupled with these rules are ancillary rules relating to the designation of “permitted entities.” One ancillary rule is a notification requirement imposed on the individual receiving such payments.

For individuals, the notification requirement is broadly stated in the regulations as follows:

An individual which receives [a payment through one or
more entities in which the individual holds a "substantial beneficial interest""] shall notify the [ASCS] county committee in the county in which [the] individual maintains a farming operation whether or not the farming operation is to be considered a permitted entity. 365

More specifically, on an annual basis, each individual holding a beneficial interest in an entity earning payments must notify the ASCS county committee whether the entity is to be considered a "permitted entity." This is referred to as the "permitted entity" designation. 366

In addition to the requirement imposed on individuals who hold a "substantial beneficial interest" in one or more entities to notify the ASCS county committee of those entities that are to be considered "permitted entities," entities entering into program contracts must also fulfill certain notification requirements. 367 The notifications are to be made by the date of the

365. 7 C.F.R. § 1497.5(a) (1990); see 7 U.S.C. § 1308-1(a)(4)(A) (1988) (general notification provisions); see also 7 C.F.R. § 1497.3(b)(Farming Operation) (1990) ("A farming operation is a business enterprise engaged in the production of agricultural products which is operated by an individual or entity which is eligible to receive payments, directly or indirectly, under one or more of the programs specified in [7 C.F.R.] § 1497.1."); 55 Fed. Reg. 1,572-73 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.3 (Farming Operation)) (amending the definition of "farming operation" by adding that "[a]n entity or individual may have more than one farming operation if such individual or entity is a member of one or more joint operations"); ASCS HANDBOOK, supra note 15, Exhibit 2, at 3 (Mar. 28, 1989) (defining "farming operation"). The ASCS Handbook provides:

An individual or entity may have more than 1 farming operation if the individual or entity has an interest in 1 or more joint operations. Each interest in a joint operation will be an additional farming operation for the individual or entity. An individual's or entity's farming operation consists of all acreage on all farms in all counties in which the individual, entity, or joint operation has an interest in the agricultural products or proceeds from the agricultural products produced.


366. See ASCS HANDBOOK, supra note 15, ¶ 76B, at 71 (Jan. 19, 1990); 7 C.F.R. § 1497.5(c)(1) (1990); 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.5(d)(1)). It is important to note that 7 C.F.R. § 1497.5(c)(1) (1990) contemplates the designation of "permitted entities" only when an individual has a substantial beneficial interest in more than three entities. However, by use of a unified form, Form CCC-501B, for certain other required notifications in addition to "permitted entity" designations, and, as a matter of stated policy in the ASCS Handbook, the ASCS requires all individuals with interest in one or more entities to so designate. See ASCS HANDBOOK, supra note 15, Exhibit 8, at 3 (Jan. 19, 1990).

367. Certain entities are excluded from this notification requirement. Specifically, for the 1990 crop year

[e]ntities shall not be subject to the provisions of paragraph (b) of this sec-
contract or agreement, in most cases, annually, and are to include both of the following:

1. The entity must provide the name, Social Security number or employer identification number, and address of each individual and entity that "holds or acquires a substantial beneficial interest in such entity." 368

2. The entity also must provide to each individual and other entity that "acquires or holds an interest in such entity of the requirements and limitations provided in [7 C.F.R. § 1497]." 369

C. The Limitations on the Designation of "Permitted Entities" and the Effect of a Designation of a "Permitted Entity"

By virtue of the two basic rules discussed above, no more than three "permitted entities" may be designated. Three "permitted entities" may be designated when the individual 370 entitled to the designation "does not receive payments for a crop." 371 A person who "receives farm program payments" may designate only two "permitted entities." 372

The designation, through notification of the ASCS county committee, of an entity as a "permitted entity" determines whether the entity will receive the respective share of the proportion [the notification requirement] if, as determined by the [ASCS] Deputy Administrator:

1. Because of the number of members of such entity no member is likely to have a substantial beneficial interest in such entity; and
2. Such provisions would cause undue financial hardship on such entity.

55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.5(c)).

For the 1989 crop year, the exclusion is functionally similar. See ASCS HANDBOOK, supra note 15, ¶ 783, at 76-76.2 (May 19, 1989).

368. 7 C.F.R. § 1497.5(b)(2) (1990); 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.5(b)(2)); see also ASCS HANDBOOK, supra note 15, ¶ 78, at 75 (Mar. 28, 1989) (detailing the notification requirement and the sanctions for noncompliance).

369. 7 C.F.R. § 1497.5(b)(1) (1990); 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.5(b)(1)); see also ASCS HANDBOOK, supra note 15, ¶ 78, at 76.3 (May 19, 1989) (detailing the notification requirement and the sanctions for noncompliance).


371. 7 C.F.R. § 1497.5(a) (1990); 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.5(a)).

372. Id.
gram payment represented by the individual responsible for making the designation. Thus, a "permitted entity is an entity designated annually by an individual which is to receive a payment, loan, or benefit under a program [subject to 7 C.F.R. § 1497]."

In that regard, the designation by each individual may be done only for that individual's respective share. In effect, the designation "permits" the entity to receive the individual's respective share. In other words, "[i]f any share of an entity is not designated, that share of the entity's payment must be denied."

**Example 20**

As an example of the designation of "permitted entities" by shares, assume a corporation is operating a farm as a "separate person," that is, it has satisfied the "person" and "actively engaged in farming" requirements. The stock in the corporation is owned equally by two persons.

The two stockholders may designate the corporation as a "permitted entity" only to the extent of their respective shares. Accordingly, if neither stockholder makes a "permitted entity" designation, the corporation would be denied payments.

However, if one of the stockholders designated the corporation as "permitted," the corporation would be entitled to receive one-half of the program payments to which it was entitled, subject to any otherwise applicable limitation. In the words of the applicable regulation, where a reduction in the payments is required because of the absence of a "permitted entity" designation for a respective interest in the entity, "[s]uch a reduction shall be made in an amount that bears the same relationship to the full payment that the individual's interest in the entity bears to all inter-

373. 7 C.F.R. § 1497.3(b) (Permitted Entity) (1990).
374. See 7 C.F.R. § 1497.5(d) (1990); 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.5(e)).
376. In addition, it is assumed that the corporation has satisfied the three "threshold requirements" that must be met by a nongovernmental entity before it can be a "separate person." See supra notes 153-58 and accompanying text.
In such a case, assuming there was more than one remaining member of the entity, "[t]he remaining entity's members shall have the opportunity to adjust among themselves their proportionate shares of the program benefits in the designated entity or entities before such reductions are made." If both stockholders made the designation, the corporation would receive all the payments to which it was entitled, again subject to any otherwise applicable limitation.

D. The Designation of "Permitted Entities" When There is an "Embedded Entity"

The designation of "permitted entities" is more complex in situations where the entity subject to the designation has another entity as one of its owners or members. The complexity arises out of the rule that only individuals may make the designation.

If an entity is owned by or has as one of its members another entity, the entity holding the ownership or membership interest is known as an "embedded entity," and the individuals who are "direct or indirect members of that [embedded] entity are responsible for making the 'permitted' designation." If more than one layer of "embedded entity" exists, that is, if the first "embedded entity" is owned by an entity, the responsibility for the designation is borne by the individuals who are direct or indirect members of the entity down to the fifth level. At the fifth level, if one of the members is still an entity, the

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377. 7 C.F.R. § 1497.5(c)(2) (1990); 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.5(d)(2)); see also 7 C.F.R. § 1497.5(d) (1990) (reduction in payment for failure to notify); 55 Fed. Reg. 1,573 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.5(e)) ("If an individual or entity fails to make such a notification . . . all entities in which the individual or entity holds a substantial beneficial interest shall be subject to a reduction in payments in the manner specified in paragraph (c)(2) [(d)(2)] of this section.").


entity at that level may designate for itself. 382

Example 21

For an illustration of the “permitted entity” designation process where five levels of “embedded entities” are present, assume the following:

Corporation A is owned by
  Individual A—33% of the stock
  Individual B—33% of the stock
  Corporation B—34% of the stock

Corporation B is owned by
  Individual A—33% of the stock
  Individual C—33% of the stock
  Corporation C—34% of the stock

Corporation C is owned by
  Individual A—33% of the stock
  Individual D—33% of the stock
  Corporation D—34% of the stock

Corporation D is owned by
  Individual A—33% of the stock
  Individual E—33% of the stock
  Corporation E—34% of the stock

Corporation E is owned by
  Individual A—33% of the stock
  Individual F—33% of the stock
  Corporation F—34% of the stock

Also assume corporation A is receiving program payments. Thus, corporation A is the entity subject to the “permitted entity” designation. Corporation A is also at the first level of five levels of “embedded entities,” with the other corporations being “embedded entities” at the remaining levels.

With the preceding facts assumed, the designation process will be examined by levels.

First Level:

Individuals A and B and corporation B own corporation A. However, only individuals A and B may designate “permitted entities.” If both designate

382. Id.
their share as one of their “permitteds,” then 66% of the possible payments to corporation A will have been designated.

Second Level:

Corporation B cannot participate in the designation process at the first level because only individuals may make designations. Thus, any designation would have to be done by the individual owners of corporation B, individuals A and C. The third owner, corporation C, cannot make a designation.

If individual A, as an owner of corporation B, designates corporation A as a “permitted entity,” the designation will be the second selection for individual A, who made the first selection at the first level. Such a designation will increase the total of the possible payments to corporation A to 77.22%. That figure is based on the 60% realized at the first level plus individual A’s one-third share of the 34% interest held by corporation B in corporation A.

If individual C, as an owner of corporation B, designates corporation A as a “permitted entity,” the designation will be the first selection for individual C. It would also increase the total of the possible payments to corporation A to 88.22% \([66\% + (66\% \times 34\%) = 88.22\%]\).

Third Level:

Corporation C cannot designate at the preceding level. Thus, any designation will have to be by its individual owners, A and D.

If individual A designates, the designation will be individual A’s third and final designation because an individual is only permitted three designations.\(^{383}\) Also, the designation will increase the total of the possible payments to corporation A to 92.25% \([66\% + (66\% \times 34\%) + (33\% \times 34\% \times 34\%) = 92.25\%]\).

If individual D designates, it will be individual D’s first selection and the total of the possible payments

\(^{383}\) See 7 C.F.R. § 1497.5(a) (1990).
to corporation A will increase to 96.07% \([66\% + (66\% \times 34\%) + (66\% \times 34\% \times 34\%) = 96.07\%]\).

**Fourth Level:**

At the fourth level, the owners of corporation D must designate for the corporation. Individual A has already made the maximum three designations. If individual E makes the designation, the first for individual E, the share of the possible total of payments that may be made to corporation A increases to 97.37% \([66\% + (66\% \times 34\%) + (66\% \times 34\% \times 34\%) + (33\% \times 34\% \times 34\% \times 34\%) = 97.37\%]\).

**Fifth Level:**

At the fifth level, corporation E may not designate. The same is true for individual A who has exhausted all three permitted designations. If individual F designates, the share of payments to corporation A is increased to 97.81% \([66\% + (66\% \times 34\%) + (66\% \times 34\% \times 34\%) + (33\% \times 34\% \times 34\% \times 34\%) + (33\% \times 34\% \times 34\% \times 34\% \times 34\%) = 97.81\%]\).

Because this is the fifth level, corporation F may designate for itself, the first and only designation allowed by a corporation. The result is an increase in the share of payments to corporation A to 98.27% \([66\% + (66\% \times 34\%) + (66\% \times 34\% \times 34\%) + (33\% \times 34\% \times 34\% \times 34\%) + (67\% \times 34\% \times 34\% \times 34\% \times 34\%) = 98.27\%]\).

**E. The Designation of “Permitted Entities” Where Two or More Individuals or Entities Have Been Combined as One “Person”**

In some circumstances, two or more individuals may be combined as one “person” for payment-limitations purposes. Similarly, one or more entities may be combined with one or more individuals. For example, an individual or entity not “actively engaged in farming” may be combined with an individual participating in a farming operation who meets the applicable requirements, or, in many instances, a married

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384. The example may be found at ASCS HANDBOOK, *supra* note 15, Exhibit 6, at 1-4, Example 1 (Sept. '20, 1988).
couple may be combined as one "person." 385

If two or more individuals are combined as one "person" for payment limitations, the combined "person" will be allowed to designate "permitted entities" in the same manner as a single individual. In other words, only one, not two or more designations may be made.

To determine whether two or three "permitted entities" may be designated, all of the payments previously received by the combined individuals are attributed to the individual making the designation. Accordingly, if any of the individuals making up the combination received prior payments, only two "permitted entities" may be designated. If none of the individuals are receiving payments, then three "permitted entities" may be designated. 386

The rule applicable to the designation of "permitted entities" where one or more entities have been combined with one or more individuals is the same as that for the combination of individuals. To determine whether the individual with whom the entity has been combined may designate two or three "permitted entities," payments received by all of the individuals, including payments received in an individual capacity, as a stockholder, or as a member of the entity, are considered as payments received by that individual. However, payments received as a shareholder or member of an "embedded entity" are not counted as payments received by that individual. 387

**Example 22**

For an example of a "permitted entity" designation involving combined individuals or entities, assume the following:

Corporation AWC has three stockholders. Producer A owns 25% of the stock and producer A's wife, W, also owns 25% of the stock in the corporation. Producer C owns the remaining 50% of the stock.

Also assume producer A and the corporation are "actively engaged in farming." In addition, both pro-

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385. For a discussion of the "combination" of individuals and entities under various rules, see supra notes 162-226 and accompanying text.
387. See id. ¶ 76G, at 73-74 (Jan. 19, 1990). If none of the individuals has earnings as an individual, three "permitted entities" may be designated by the combined "person." *Id.*
Producer A and corporation AWC have received program payments.

Producer A and his wife, W, are combined as one "person." As a combined "person," they are treated as a single individual for purposes of making a "permitted entity" designation. In other words, together they have one designation.

To determine whether the combination of A and W will have the right to designate two or three "permitted entities," the program payments received by either of them will be attributed to the combined "person." Under the assumed facts, producer A has received payments. Therefore, only two "permitted entities" may be designated.

An ancillary rule applicable to the designation of "permitted entities" by combined individuals or entities is "if 2 or more combined individuals have stock or membership in an entity that is not a part of the combined ‘person’, all these individuals’ shares in that entity may be covered by 1 ‘permitted’ designation." In this example, corporation AWC is not a part of the combined "person." Also, under the basic rules governing the designation of "permitted entities,” all of the shares in corporation AWC must be designated to be paid.

Therefore, if producer A and W, as a combined "person" desire to have those shares paid, they may elect to use one of their two "permitted designations" to cover their respective shares in the corporation. The ancillary rule will allow them to cover both of their respective 25% interests in one designation.

If 100% of the share of payments to corporation AWC is to be paid, producer C must also designate his or her share. In that regard, the rules applicable to the designation of "permitted entities" when individuals or entities have been combined into one "per-

388. They are combined as one "person" pursuant to 7 C.F.R. § 1497.19 (1990). See supra notes 185-97 and accompanying text.
son" do not obviate the rule that each share of all entities must be designated by the individual stockholders or entities if it is to be paid. Thus, if in this example two or more entities had been combined into one "person," each share must have been designated by the individual stockholders or members for it to be paid just as if there had been no combination.\textsuperscript{391}

**VII. Changes in Farming Operations**

Prior to the enactment of the Farm Program Payments Integrity Act of 1987 which is the current basis of payment-limitations law, the rules governing payment limitations provided that "[a]ny change in farming operations that would otherwise serve to increase the number of persons for application of the payment limitation must be bona fide and substantive."\textsuperscript{392} The concept of a "substantive change" was broadly defined and included a substantial decrease in the size of the farm.\textsuperscript{393}

When the GAO investigated the administration of the then-existing payment-limitations rules prior to the enactment of the 1987 Act, it found the "substantive change" rule was subject to abuse. In one instance, the GAO documented a "substantive change" consisting of a thirty-five percent decrease in the amount of land farmed. Prior to the change, the farm was operated by a father and his two sons who each qualified as a separate person. The "substantive change," i.e., the thirty-five percent reduction in the amount of land farmed, was used to justify the addition of three more family members. Each family member qualified as a separate person. The GAO noted, under the then-existing rules, that "government program payments on this operation could double, while the amount of land being farmed declines by one-third."\textsuperscript{394}

Compounding the potential for abuse presented by the expansive definition of "substantive change" was the vague criteria used to determine whether such a change had occurred. Consequently, different ASCS county officials interpreted


\textsuperscript{392.} 7 C.F.R. § 795.14(a) (1988).

\textsuperscript{393.} Id. § 795.14(b).

\textsuperscript{394.} BASIC CHANGES, supra note 63, at 27.
“substantive change” differently. For example, one county considered a two percent increase in the amount of land farmed to be a “substantive change” while another county required a minimum increase of twenty percent to make a similar finding.\(^{395}\)

The current regulations applicable to changes in farming operations are an attempt to correct the potential for the abuses and inconsistencies documented by the GAO.\(^{396}\) The regulations do not preclude changes in a farming operation. However, the fundamental rule governing changes in farming operations is that “[a]ny change in a farming operation that would increase the number of persons must be bona fide and substantive.”\(^{397}\)

A corollary rule is that any change not found to be bona fide and substantive in a previous year will not be so considered in a subsequent year. Nor will such a change be part of the consideration if a change is made in a subsequent year. More simply stated, “[a] change in a farming operation in a previous year that was not considered to be bona fide and substantive shall not increase the number of persons in a subsequent year.”\(^{398}\)

One change, the addition of a family member to the operation, is deemed to comply with the fundamental rule by statute.\(^{399}\) However, the addition of the family member must be in accordance with 7 C.F.R. § 1497.14,\(^{400}\) and must not affect the status of any other individual or entity who is added to the operation.\(^{401}\)

\(^{395}\) Id. at 36-37.

\(^{396}\) The regulations are found at 7 C.F.R. § 1497.18 (1990). The rules have been amended effective with the 1990 crop year; see also Agricultural Reconciliation Act of 1987, Pub. L. No. 100-203, § 1303(E), 101 Stat. 1330-17 (to be codified at 7 U.S.C. § 1308(5)(E)) (“The Secretary may not approve . . . any change in a farming operation that otherwise will increase the number of persons to which the limitations under this section are applied unless the Secretary determines that the change is bona fide and substantive.”).

\(^{397}\) 7 C.F.R. § 1497.18(a) (1990).

\(^{398}\) Id.

\(^{399}\) Agricultural Reconciliation Act of 1987, Pub. L. No. 100-203, § 1303(E), 101 Stat. 1330-17 (to be codified at 7 U.S.C. § 1308(5)(E)).

\(^{400}\) For a discussion of the “family members” provision of 7 C.F.R. § 1497.14 (1990), see supra notes 317-22 and accompanying text.

\(^{401}\) See 7 C.F.R. § 1497.18(a) (1990); see also ASCS HANDBOOK, supra note 15, ¶ 146G1, at 148 (Jan. 19, 1988) (The addition of the family member must be “bona fide.”).
Certain other changes, if bona fide, are deemed to be substantive by regulation. Those changes are as follows:

(1) With respect to a landowner only, a change from a cash rent to a share rent;\(^\text{402}\)

(2) An increase through the acquisition of land not previously involved in the farming operation of approximately 20% or more in the total cropland involved in the farming operation if such cropland has crop acreage bases which are at least normal for the area;\(^\text{403}\)

(3) A change in ownership by sale or gift of a significant amount of equipment from an individual or entity who previously has been engaged in a farming operation to an individual or entity who has not been involved in such operation. The sale or gift of equipment will be considered to be bona fide and substantive only if the transferred amount of such equipment is commensurate with the new individual's or entity's share of [the rental value of all equipment on] the farming operation;\(^\text{404}\) or

(4) A change in ownership by sale or gift of a significant amount of land from an individual or entity who previously has been engaged in a farming operation to an individual or entity who has not been involved in such operation. The sale or gift of land will be considered to be bona fide and substantive only if the transferred amount of such land is commensurate with the new individual's or entity's share of the farming operation.\(^\text{405}\)

Additionally, the ASCS, acting through its Deputy Administrator, has the authority to determine that other bona fide changes are to be considered substantive.\(^\text{406}\)


\(^{403}\) Id. § 1497.18(a)(2).

\(^{404}\) Id. § 1497.18(a)(3).

\(^{405}\) Id. § 1497.18(a)(4); see also ASCS Handbook, supra note 15, ¶ 146G, at 148 (Jan. 19, 1990) (discussing the changes which, if bona fide, are deemed substantive).


Amendment 11 to the ASCS Handbook added many new instructions for determining whether changes to a farming operation are “bona fide and substantive.” A number of the new instructions are applicable, by category, to the “person” categories of joint operations, entities, and individuals. Some are program specific. Because of their varied and highly specific applicability, the instructions are beyond the scope of this article. Readers contemplating or assessing changes in farming operations should consult those instructions. See ASCS HANDBOOK, supra note 15, ¶ 146, at 147-148.10 (Jan. 19, 1990). Examples accompanying the substantive change provisions are found at ASCS HANDBOOK, supra note 15, Exhibit 10.8, at 1-5 (Jan. 19, 1990).
The following are examples of "bona fide and substantive change" determinations:

Example 23

Assume that corporation A is owned equally by stockholders B, C, D, and E. Corporation A owns and operates a farm.

Individuals C, D, and E form general partnership X. General partnership X leases land from corporation A for a share of the crop. General partnership X also leases land from individual S. Corporation A has never farmed the land leased by general partnership X from individual S.

The land leased from individual S reflects approximately a 20% increase in cropland from the land being farmed by corporation A. The crop acreage bases on the increased land is normal for the area.

On those assumed facts, a "bona fide and substantive change" would have occurred through leasing additional cropland from individual S. The size of the farming operation has been increased by at least 20%. The crop acreage bases are normal for the area.\[407\]

Example 24

Father A previously conducted an individual farming operation consisting of owned land. For the current year, father A proposes to expand the operation by forming a joint venture with his adult daughters B and C, with each member having equal shares. No additional acreage is farmed. However, father A has gifted to each daughter one-third of the owned land.

\[407\] See 7 C.F.R. § 1497.18(a)(2) (1990); 55 Fed. Reg. 1,574 (1990) (interim rule applicable to the 1990 crop year to be codified at 7 C.F.R. § 1497.18(c)).


Amendment 11 to the ASCS Handbook added a new exhibit, Exhibit 10.8, illustrating some of the additions to the rules governing "bona fide and substantive change" to farming operations. The examples provided in Exhibit 10.8 do not illustrate the operation of the basic rules contained in the regulations in the way the examples given in this article do. Therefore, their content is beyond the scope of this article. However, readers concerned with the effects of the new instructions relating to joint operations, corporations, and individuals should consult that Exhibit. See ASCS HANDBOOK, supra note 15, Exhibit 10.8, at 1-5 (Jan. 19, 1990).
A "bona fide and substantive change" has occurred because a gift of land commensurate with the individual's share of the farming operation has been received.408

VIII. MISCELLANEOUS MATTERS

A. The Prohibition Against Schemes or Devices To Avoid Payment Limitations

Persons adopting or participating in a scheme or device to evade or avoid the payment-limitations rules are subject to sanctions.409 A "scheme or device" includes, but is not limited to, the following:

1. concealing information that affects the application of the payment-limitations provision;
2. submitting false or erroneous information; or
3. creating fictitious entities for the purpose of concealing the interest of a "person" in a farming operation.410

The sanctions include the following:

1. ineligibility to receive farm program payments due on all farms in which the person has an interest in the year in which the scheme or device was adopted and in the subsequent year;
2. being required to refund all improperly paid payments; and
3. criminal prosecution.411

Sanctions may also include the remedies provided under the Program Fraud Civil Remedies Act of 1986.\textsuperscript{412} Moreover, there may be joint and several liability under 7 C.F.R. § 1497.25, which provides as follows:

If two or more individuals or entities are considered to be one person and the total payment received is in excess of the applicable payment limitation provision, such individuals or entities shall be jointly and severally liable for any liability which arises therefrom. The provisions of this section shall be applicable in addition to any liability which arises under a criminal or civil statute.\textsuperscript{413}

\section*{B. Equitable Adjustments}

Pursuant to 7 C.F.R. § 1497.26, the ASCS Deputy Administrator for State and County Operations [hereinafter DASCO] has the discretionary authority to provide equitable relief in two circumstances:

[First, a]ctions taken by an individual or an entity in good faith on action or advice of an authorized representative of the Deputy Administrator may be accepted as meeting the requirements of . . . [7 C.F.R. § 1497] to the extent the Deputy Administrator deems necessary in order to provide fair and equitable treatment to such individual or entity.\textsuperscript{414} [Second, i]n cases in which the application of this part will reduce payments to a farming operation, the Deputy Administrator may waive the application of the provisions of § 1497.18 [changes in farming operations] with respect to any reorganization applied for prior to April 1, 1989, or such other date as may be determined and announced by the Deputy Administrator, to the extent the Deputy Administrator determines appropriate to facilitate equitable reorganizations that do not result in an increase in payments.\textsuperscript{415}


\textsuperscript{413} 7 C.F.R. § 1497.25 (1990); see also ASCS HANDBOOK, supra note 15, ¶ 240A, at 244 (Jan. 19, 1990) ("If 2 or more individuals or entities who are considered as 1 'person' receive payments totaling more than the limitation, these individuals or legal entities are jointly and severally liable for the refund.").

\textsuperscript{414} 7 C.F.R. § 1497.26(a) (1990); see also id. § 790 (authorizing DASCO to grant equitable relief when a producer has relied in good faith on ASCS advice). For a more detailed discussion of the equitable authority of DASCO, see Kelley, \textit{In Depth: ASCS Appeals: The Equitable Authority of DASCO}, 7 AGRIC. L. UPDATE 6 (1990).

\textsuperscript{415} 7 C.F.R. § 1497.26(b) (1990).
With respect to this second circumstance, the ASCS Handbook provides that the allowance for equitable reorganization is limited to the 1989 crop year. For that year only, the substantive and bona fide change rule embodied in 7 C.F.R. § 1497.18 shall be waived "if the reorganization does not serve to increase the number of 'persons' above the number recognized in 1988."416

C. Appeals

Appeals of decisions made pursuant to the payment-limitations rules are governed by 7 C.F.R. § 780.417 Although a complete discussion of the ASCS administrative appeals process is beyond the scope of this article, the following discussion summarizes the administrative appeals process.418

For disputes over 1989 and 1990 crop year payments, the initial step in the appeals process is a request for reconsideration directed to the office or committee that made the initial decision adversely affecting the producer.419 Usually, the county committee will have made an initial decision. In such a case, the request for reconsideration is to be directed to the county committee. If, on reconsideration, the county committee affirms its earlier decision, an appeal may be taken to the state committee.420 Appeals from state committee determinations are taken to DASCO.421 DASCO is the final stage in the administrative appeals process for disputes involving payments for the 1989 and 1990 crop years.422

Beginning with the 1991 crop year, the appeals process will change due to the enactment of the 1990 Farm Bill's new producer appeals provisions.423 Requests for reconsideration will

417. 7 C.F.R. § 1497.27 (1990); see also ASCS HANDBOOK, supra note 15, ¶ 241, at 244-45 (Jan. 19, 1990) (setting forth the time limitations governing appeals). The volume of the ASCS Handbook covering appeals is short-referenced "3-CP" (Rev. 2).
418. For a more complete treatment of the appeals process, see ASCS ADMINISTRATIVE APPEALS, supra note 18 and the materials cited therein.
419. See 7 C.F.R. § 780.3 (1990). The request for reconsideration and all subsequent appeals in the administrative appeals process must be made "within 15 days after written notice of the determination is mailed to or otherwise made available to the participant." Id. § 780.6(a).
420. Id. § 780.4.
421. Id. § 780.5.
422. See id. § 780.9(a).
no longer be necessary; appeals may be taken directly to the next level. In addition, a National Appeals Division will be created to hear appeals at the national level. Although the decision of the Director of the National Appeals Division will be the final stage in the administrative appeals process, the Administrator of the ASCS and DASCO are granted the authority to reverse or modify any determination made by the Director of the National Appeals Division.

In addition to the appeals regulations found at 7 C.F.R. § 780, payment-limitations appeals are also subject to regulations found at 7 C.F.R. § 1497.27. The regulations at section 1497.27 are unique to administrative appeals of payment-limitations disputes. Specifically, they provide as follows:

(a) With respect to such appeals, the applicable reviewing authority shall:
   (1) Schedule a hearing with respect to the appeal within 45 days following receipt of the written appeal; and
   (2) Issue a determination within 60 days following the hearing.

(b) The time limitations provided in paragraph (a) of this section shall not apply if:
   (1) The appellant, or the appellant’s representative, requests a postponement of the scheduled hearing;
   (2) The appellant, or the appellant’s representative, requests additional time following the hearing to present additional information or a written closing statement;
   (3) The appellant has not timely presented information to the reviewing authority; or
   (4) An investigation by the Office of Inspector General is ongoing or a court proceeding is involved which affects the amount of payments a person may receive.

see also id. § 1171(a), 136 CONG. REC. H11,075 (Producer appeals provisions will become effective beginning with the 1991 crop year.). However, as the time of the publication of this article, the USDA had taken the position that it was precluded from implementing the producer appeals provisions of the 1990 Farm Bill by virtue of section 640 of the Rural Development, Agriculture, and Related Agencies Appropriations Act of 1991, Pub. L. No. 101-506, 104 Stat. 1315, 1350.

425. Id.
426. Id.
427. 7 C.F.R. § 1497.27 (1990).
(c) If the deadlines provided in paragraphs (a) and (b) of this section are not met, the relief sought by the producer's appeal will be granted for the applicable crop year unless the Deputy Administrator determines that the producer did not follow the farm operating plan which was presented initially to the county committee for the year which is the subject of the appeal.

(d) An appellant may waive the provisions of paragraphs (a) and (b) of this section.428

CONCLUSION

The broad goals of payment-limitations law are essentially two-fold. First, the law is intended to restrict government expenditures for federal farm programs. Second, the law is designed to insure that only persons who are dependent on agricultural production for their livelihood will receive farm program payments. Despite the comparative simplicity of its goals, payment-limitations law consists of a veritable labyrinth of rules, some of which are extraordinarily complex.

For those who do not participate in the federal farm programs and who, thus, are not directly affected by payment-limitations law, it may be satisfactory to join in the conclusions of others that payment-limitations law is "too complicated to fully understand and . . . a 'nightmare' to keep track of."429 However, for those who are dependent on agricultural production for their livelihood and whose economic well-being requires an understanding of payment-limitations law, its complexity cannot be an excuse for not attempting to understand it.

This article has been a modest attempt to explain the basic workings of the payment-limitations rules. Ultimately, the burden of understanding the rules falls on those who are called upon to assist producers who are participating or who desire to participate in the federal farm programs. What is required is good lawyering, and there are plenty of opportunities to apply that skill in the law of federal farm programs.

428. Id.; see also ASCS HANDBOOK, supra note 15, Notice PL-23 (July 27, 1989) (discussing the timing for payment-limitations appeals).

429. PROGRESS TOWARD GOALS, supra note 8, at 59. Ironically, these conclusions were drawn by employees of the agency charged with the administration of the payment-limitations rules, the ASCS.