



April 2, 2009

Mr. Dan McGlynn  
Acting Director  
Production, Emergencies and Compliance Division  
Farm Service Agency  
U.S. Department of Agriculture (USDA)  
Stop 0517 Room 4754  
1400 Independence Ave., S.W.  
Washington, DC 20250-0517

Dear Mr. McGlynn:

On behalf of the National Association of Wheat Growers (NAWG), a federation of 20 wheat grower associations, I write to offer comments regarding the interim final rule published in the *Federal Register* on Dec. 29, 2008 (73 FR 79267-79284) entitled "**Farm Program Payment Limitation and Payment Limitation Eligibility for 2009 and Subsequent Crop, Program, or Fiscal Years**" (RIN 0560-AH85).

NAWG has a number of concerns with the interim final rule and appreciate the opportunity to provide comment. Though we appreciate the efforts of USDA to address some of these issues through clarification and guidance provided to date to state and county Farm Service Agency (FSA) offices for the 2009 crop year, we would like to see USDA address a number of both fundamental and technical concerns prior to the rule becoming final in advance of the 2010 crop year.

NAWG recognizes that the 2008 Farm Bill contained significant reform to the farm safety net including elimination of the three-entity rule, implementation of direct attribution and a reduction in the adjusted gross income (AGI) limitations for payment eligibility. While this rule contains these expected changes and several others required by statute, it also contains a number of discretionary changes that were not required by statute and that appear to go beyond the intent of Congress. These additional, unanticipated changes have created a great deal of confusion, frustration and uncertainty in wheat-growing country.

In addition, the timing of the issuance and implementation of the rule has been less than ideal. Because the rule was issued in the waning days of 2008, and because growers were only then informed that these rules would be considered final for the 2009 crop year, USDA created a scenario in which producers were given inadequate time to evaluate and comment on these regulations for the 2009 crop year. Consequently, growers could now face three consecutive years with three different sets of rules, creating an extraordinary burden on both simple and complex operations seeking to comply with them.

**We appreciate the 60-day extension of the comment period published in the *Federal Register* on Feb. 5, 2009 (74 FR 6117), which has enabled the gathering of input from wheat growers across the country as they work to evaluate the implications of these rules to their operations.** This additional time has enabled us to identify a number of specific concerns that we urge USDA to consider prior to the 2010 crop year.

### **Actively Engaged**

The rule goes beyond the statutory requirements of the 2008 Farm Bill in redefining “actively engaged” for purposes of determining farm program payment eligibility. The only statutory requirement for change to this definition was to eliminate discrimination against spouses. Under previous rules, in order to prove active engagement in the operation, producers were required to meet a two-pronged test showing that they contributed a) capital, land and/or equipment and b) labor and/or management to the farming operation, and show that these contributions were commensurate with their claimed share of profits and losses and that these contributions were at risk,. The interim final rule makes discretionary changes to this rule, creating a significant amount of frustration and uncertainty in wheat growing country.

It is required under 1603(d) of the statute that “the stockholders or members collectively make a significant contribution of personal labor or active personal management to the operation” for purposes of determining whether or not a legal entity is actively engaged in a farming operation. However, Section 1400.204(a)(2) of the interim final rule requires that “*each* partner, stockholder or member with an ownership interest makes a significant contribution...of active personal labor, active personal management or a combination of active personal labor and active personal management to the farming operation.” It seems unnecessary, and is specifically not required by statute, that each partner, stockholder or member must make this contribution in order to determine that the entity itself is actively engaged.

Further, the interim final rule mandates that the claimed contributions of labor or management be “separate and distinct” and “identifiable and documentable.” Although we recognize the concerns of USDA regarding passive investors being eligible for farm program payments, this additional language of “separate and distinct” and “identifiable and documentable” creates an illogical and unenforceable standard for operations organized as legal entities in which there are shared management responsibilities. It is common in current farm business structures for various members/shareholders to make collective decisions and share responsibility for carrying out those decisions. **The added requirements of “separate and distinct” and “identifiable and documentable” create an overly burdensome paperwork standard and are at serious risk of inconsistent application. We ask USDA to remove these additional requirements.**

In addition, USDA risks causing significant damage to growers’ abilities to design and implement succession plans by requiring that “each partner, stockholder or member with an ownership interest” make a significant contribution of active personal labor or active personal management. Next generation family members and retired parents will commonly be involved as shareholders in a family operation to facilitate the passage of the farm among generations. It is certainly our hope that it is not the intent of USDA to target retired owners that have served the majority of their lives in agriculture or the next generation members intending to return to the farm.

To ensure that participation of these deserving members is preserved, **we recommend that USDA gives producers two options to comply with the new requirement that each member of the entity make a significant contribution.** The first option would still require producers to prove that they are making a significant contribution of active personal labor or active personal management in order to justify their share of the payment. (It should be noted that our recommendation above stands in this instance as well – that the requirements of “separate and distinct” and “identifiable and documentable” be rescinded.) The second option would be to allow producers to request, in writing, a “combined person” determination. FSA should then allow the collective contributions of the combined persons to be used to meet the labor or management requirement. The combined persons would then collectively get one payment limitation through direct attribution.

We maintain our belief that it is unnecessary to require that “each partner, stockholder or member with an ownership interest” make a significant contribution and that recognition of collective contributions would be preferable for purposes of determining active engagement of the entity. However, we believe that the recommendation above would be an improvement to the interim final rule as it would at least take into consideration next generation and retired owners that may not be able to perform any labor or management in smaller, family-owned operations looking only to preserve a single payment.

We also find it troubling that USDA added the requirement that contributions not only be at risk for a loss, but that the risk be commensurate with the claimed share of profits and losses. The addition of the commensurate requirement was not required by statute and the intent of USDA in including this language is unclear. It is also unclear how a person’s risk would be measured to determine whether or not it is commensurate to their claimed share of profits and losses. In a general partnership all partners are legally considered to be responsible for 100 percent of the partnership’s liabilities and obligations. If all partners are 100 percent responsible, then they are all at risk for 100 percent of the partnership’s liabilities. However, one partner may have substantial personal assets that are unrelated to the partnership (i.e. a parent nearing retirement), and another partner may have very few assets that are not committed to the partnership (i.e. an adult child just entering farming). Thus the partner with more personal assets would have a substantially higher risk, even if both partners contributed equally to the farming operation. It is unclear, under this scenario, whether any joint operation could meet the requirement that each partner’s risk be commensurate to their claimed share of profits and losses. **We recommend USDA remove the additional language requiring that the risk be commensurate with the claimed share of profits and losses.**

Lastly, it is our understanding that individual members of an LLC that owns land and rents it out for a share of the crop will be determined to be actively engaged in the LLC under the land owner exemption. However, this was not clear in the regulation or in official guidance provided in the 4-PL handbook to date. **We urge USDA to include this clarification in formal guidance provided to state and county FSA offices.**

### **Spousal Qualification**

The 2008 Farm Bill did require USDA to change the rules related to “actively engaged” definitions in the case of a spouse. However, the interim final rule creates two standards for spouses – one for the spouse of an individual operator and one for a spouse operating as a part of an entity. We believe the spouse of an actively engaged producer should be deemed actively engaged for payment eligibility purposes regardless of the structure of the operation.

Since publishing the rule, USDA has issued clarification in 4-PL that the spouse of an individual will also be considered actively engaged if both spouses are members of the same entity and one spouse meets the requirements of actively engaged. **We appreciate this clarification and urge USDA to maintain this interpretation as clarified when publishing the final rule.**

### **Confidentiality**

NAWG is particularly concerned with elements of this rule that might jeopardize the privacy of wheat growers – especially with regard to information required in various forms and approved verification mechanisms for AGI purposes. While growers respect the work done by FSA employees and their county committees, it is not in either group’s best interest to have sensitive and confidential information shared unnecessarily.

### Forms

Though designed with the intent to determine program eligibility under the new “actively engaged” definitions, both the forms that have been previously used and the first round of new forms released by USDA following issuance of the interim final rule seek information that is intrusive to individuals and operations. For example, Part E of Form CCC-902E requires producers to list information related to rental rates and crop share agreements. This information is considered confidential and could in fact be used by a competitor to bid against an individual producer for land. Part F of the same form requires information related to sources of capital that most growers would consider highly confidential. **While we recognize that these intrusive questions solicit information that could be relevant to the determination of eligibility, we ask that they be re-evaluated to determine if they are absolutely necessary in light of their negative impact on grower privacy.**

### AGI Certification

The interim rule states in Section 1400.502 that individuals or entities must prove compliance with AGI limitations on an annual basis through certification from a certified public accountant (CPA) or attorney; self-certification; submission of IRS documents and supporting financial data; and authorization of CCC to obtain tax data from the IRS for purposes of compliance verification. The rule implies that all four methods of documentation/verification are required on an annual basis. **We recommend that USDA clarify this to read that self-certification, in addition to either third-party certification or submission of IRS documents and supporting financial data are acceptable methods of certification.** Additionally, in the event that the USDA-Treasury initiative is finalized and producers are required to authorize CCC to obtain tax data from the IRS (see section directly below), it would be expected that the latter two certification methods (third-party certification or submission of IRS documents) would be redundant and therefore unnecessary on an annual basis.

Allowing third-party verification is a preferred method to determine eligibility for many producers as there is reasonable reluctance to submit comprehensive financial documents to local FSA offices due to considerations of confidentiality. However, many accountants and lawyers have expressed discomfort with the guidance provided by USDA and reluctance to assume the liability associated with providing certification. **We recommend that USDA provide adequate guidance to those that will be providing certification to reduce uncertainty and ensure that this alternative remains a viable option for producers.**

### AGI Verification

Since issuance of the interim final rule, USDA has announced an initiative with the Department of the Treasury to develop a mechanism whereby USDA can better verify compliance with AGI limitations. Wheat growers largely recognize the need for USDA to have the tools necessary to verify compliance with applicable standards. For that reason, we are interested in seeing the USDA – Treasury Department verification initiative move forward cautiously and with maximum opportunity for stakeholder input in order to ensure adequate communication and education regarding the protection of grower privacy and confidentiality.

Our goal – and what we believe to be the goal of USDA – is to ensure that these programs remain available to those for whom they are intended, and to do so in a way that will ensure their continued viability while maintaining the highest regard for the privacy of our growers.

### **Other Items**

#### Financing Arrangements

Sections 1400.203(b)(2) and 1400.204(c)(2) establish reasonable criteria to govern the financing of joint operations and other entities, ensuring that financing arrangements between partners, stockholders or entities involved in joint operations will be arms-length transactions. However, contradictory language is found in Sections 1400.203(b)(1) and 1400.204(c)(1). **These clauses should be clarified to reflect the intent that capital should not be acquired as a result of a loan made to, guaranteed, co-signed or secured by any person, legal entity or joint operation having an interest in the farming operation, but that in the event that capital is acquired using such guarantees, co-signature or joint security, the loan must be reflective of an arms-length transaction.** This could be accomplished by amending both 1400.203(b)(1) and 1400.204(c)(1) by deleting the words “must not” and inserting the words “should not” and by amending both 1400.203(b)(1)(iii) and 1400.204(c)(1)(iii) by deleting the word “and” at the end of the clause and inserting the word “or” in its place.

#### Application Timing

The application eligibility window of 60 days begins when a grower submits his or her paperwork. If FSA staff requires additional paperwork, it is our understanding that the clock does not stop. Previous practice allowed growers to withdraw their application until they were able to gather the additional required paperwork and resubmit. **We urge USDA to continue allowing this practice as any reversal of this allowance would cause difficulty for both growers and FSA staff.**

#### Incomplete Enrollments

It is our understanding that failure to complete a CCC-509 on the part of any individual with an entitlement to a share of contract acreage will cause FSA to consider the CCC-509 withdrawn. This is extremely problematic for growers that farm tribal ground with numerous landowners. Though most producers are able to secure power of attorney from their landlords, the Bureau of Indian Affairs does not allow their members to engage in power of attorney actions. **This issue should be taken into consideration when considering cases of incomplete enrollments.**

#### Paperwork Burden

Despite the “landowner exemption,” landowners who enter into share rent agreements with producers are required to fill out extensive paperwork in order to be eligible for payments. This paperwork burden alone can cause landowners enough frustration to consider moving from share rent to cash rent

agreements. **We urge USDA to create a streamlined paperwork process in order to reduce the likelihood of this occurring.**

### **Conclusion**

I thank you for allowing us the opportunity to comment and urge USDA to amend the interim final rule to resolve these pending concerns. We also urge USDA to continue working with participating grower organizations and state and county FSA offices to reduce the amount of uncertainty in the countryside and ensure both continued grower access to and the integrity of these carefully designed farm programs.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Karl Scronce". The signature is written in a cursive style with a long horizontal flourish at the end.

Karl Scronce  
President